478

122

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 250.

THE ARGENTINE MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE TERRIBLE MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED MAY 19, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 250.

THE ARGENTINE MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE TERRIBLE MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

	Original.	Print
Caption	1	1
Complaint	1	1
Summons	4	2
Marshal's return	5	3
Answer	6	3
Petition for leave to survey and inspect property	10	6
Order granting leave to survey and inspect property	15	8
Replication to answer	17	9
Trial commenced	21	11
Trial continued	22	12
Motion for non-suit	23	13
Amended complaint	25	14
Trial continued	27	15
Verdict	28	15
Motion for new trial	29	16
Order denying new trial	31	17
Judgment	32	17
Motion to set aside judgment, &c.	33	18
Motion to vacate order setting aside judgment	34	19
Order vacating judgment, &c.	35	19
Stipulation substituting Terrible Mining Co. as plaintiff	36	20
Second amended complaint	38	21

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Order granting motion to strike out part of amended complaint	40	22
Second trial commenced	41	22
Answer to second amended complaint	42	23
Second trial continued	46	25
Verdict	48	26
Motion for new trial	49	27
Order fixing time to file bill of exceptions	50	27
Order denying motion for new trial, &c.	50	28
Judgment	51	28
Bill of exceptions	53	29
Evidence for plaintiff	54	29
Testimony of Fred. C. Buckley	55	29
John Hurlburt	55	29
Prosper J. Goves	57	30
John J. Devlin	58	30
Location certificate of Adelaide Mining Claim	61	31
Amended location certificate of Adelaide Mining Claim	64	32
Evidence for defendant	70	34
Patent for the Camp Bird Lode	70	34
Pine Lode	79	37
Keystone Lode	90	40
Charlestown Lode	102	44
Testimony of Wm. B. Page	117	48
Franz Fohr	127	51
Defendant's requests as to charge	128	51
Charge to jury	131	52
Exceptions to charge	138	54
Motion for new trial	141	55
Exhibit A—Map	144	56
B— "	145	56
Bond	147	56
Writ of error	148	58
Return of writ of error	149	58
Citation	150	59
Proof of service of citation	151	59
Affidavit as to value	152	60
Clerk's certificate	153	60

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 11th day of October, A. D. 1880, came Frederick S. Van Zandt, trustee, by Messrs. Thomas & Campbell and Belford & Reed, his attorneys, and filed in said court his complaint, and sued out of and under the seal of said court a writ of summons against The Argentine Mining Company, and the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the Eighth Judicial Circuit in and for said District.

FREDERICK S. VAN ZANDT, Trustee,
vs.
THE ARGENTINE MINING CO.

The plaintiff complains and alleges that he is the owner of the Ad-laide Lode mining claim, situate in California mining district, county of Lake, and State of Colorado, known and described as follows: Beginning at corner No. 1, a pine post being northwest corner of same, from which discovery post and shaft bears S. 14° 45′ E. 201 feet (variation in all courses 15° E.), and U. S. locating monument No. 11, established April 25th, 1877, by Charles W. Milburn and W. A. Bradt, U. S. deputy mineral surveyors, bears S.
2 18° 21′ W. 1,556 feet, and the said monument No. 11 bears N. 25° 47′ E. 1,703.9 feet from corner No. 5, survey No. 232; thence 33° 30′ W. 750 feet to stake 1,500 ft. to corner No. 2; thence S. 51° E. 300 ft. to corner No. 3; thence N. 33° 30′ E. 750 ft. to stake 1,500 feet to corner No. 4; thence N. 51° W. 300 feet to place of beginning.

That the plaintiff has been and is entitled to the ownership and possession of said premises by virtue of a compliance by himself and his grantors with the local laws, rules, and customs of miners in said California mining district and the statutes of the United States and of the State of Colorado concerning mineral lands.

That the plaintiff is now entitled to the possession of said Ad-laide mining claim and each and every part thereof.

That said mining claim is of great value, to wit, of the value of five hundred thousand dollars.

That the plaintiff is a citizen of the State of Colorado, and the defendant is a corporation and citizen of the State of Missouri and authorized by virtue of a compliance with the local laws, rules, and regulations of the State of Colorado to do business in said State.

That on, to wit, the 2d day of October, A. D. 1880, the defendant forcibly and unlawfully entered on said Ad-laide Lode mining claim and wrongfully and unlawfully ousted the plaintiff from the possession thereof and wrongfully and unlawfully withheld and

still does wrongfully and unlawfully withhold possession of said premises from the plaintiff, to his damage in the sum of twenty-five thousand dollars.

Wherefore the plaintiff prays judgment:

1. For the sum of twenty-five thousand dollars damages, as aforesaid.

3 2. For the recovery of possession of said above-described premises.

3. For the costs of this suit, to be taxed.

(S'g'd) THOMAS & CAMPBELL,
BELFORD & REED,
Att'ys for P'l'ff.

Endorsed: No. 594. Circuit court U. S. F. S. Van Zandt *vs.* Argentine Mining Co. Complaint. Filed Oct. 11, 1880. (S'g'd) Edward F. Bishop, clerk. Thomas & Campbell, Belford & Reed, for pl'ff.

And the said summons is in words and figures as follows, to wit:

4 *Summons.*

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the United States for the District of Colorado.

FREDERICK S. VAN ZANDT, Trustee, Plaintiff,
versus
THE ARGENTINE MINING COMPANY, Defendant.

Complaint. Filed in the clerk's office this 11th day of Oct., A. D. 1880.

The President of the United States of America to the Argentine Mining Company, Greeting:

You are hereby notified that an action has been brought in said court by Frederick S. Van Zandt, trustee, plaintiff, against you as defendant, to recover the possession of certain specific real property situate in Lake county, State of Colorado, to wit: the Adelaide Lode mining claim, in California mining district, as more particularly set forth and described in the complaint filed herein, and to which reference is here made, for the sum of $25,000.00 damages, and for the costs of this suit.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 11th day of Oct., A. D. 1880, and of the Independence of the United States the 105th year.

[Seal Circ't C't U. S., Colo.]

(S'g'd) EDWARD F. BISHOP, *Clerk.*

5 **Proof of Service.*

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

LEADVILLE, *Nov.* 2, *A. D.* 1880.

I hereby certify that I received the within writ on the 18th day of October, A. D. 1880, and that I have personally served the same upon The Argentine Mining Company, the said defendant, by delivering to James Brierton, general manager of the said "The Argentine Mining Company," personally, a true copy of the within writ, at Lake county, 18th day of October, A. D. 1880. No president, vice-president, secretary, treasurer, or other officer of the said The Argentine Mining Company found.

This writ therefore returned served, as the law directs, this 6th day of November, A. D. 1880.

(S'g'd) P. P. WILCOX, *Marshal,*
By CY. B. AYRES,
Deputy Marshal.

[Endorsed:] Gen. No. 594. Circuit court of the United States for the district of Colorado. Fred'k S. Van Zandt, trustee, plaintiff, *versus* The Argentine Mining Company, defendant. Summons. Filed this 6 day of Nov., A. D. 1880. (S'g'd) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Thomas & Campbell, of Leadville, attorneys for plaintiff.

6 And afterwards and on, to wit, the 27th day of November, A. D. 1880, came the said defendant, by Messrs. Dixon & Reed, its attorneys, and filed in said court and in said cause its answer to the complaint heretofore filed herein; and the said answer is in words and figures as follows, to wit:

Answer.

In the Circuit Court of the United States for the District of Colorado.

FREDERICK S. VAN ZANDT, Trustee,
vs.
THE ARGENTINE MINING COMPANY.

The defendant, for answer to the complaint of the plaintiff in this action, says that it denies that the plaintiff is the owner of the Ade-

*See Rule XVI.

laide Lode mining claim mentioned and described in said complaint.

Denies that the plaintiff has been or was at the time of the commencement of this action or is now entitled to the ownership and possession of said premises by virtue of a compliance by himself and his grantors with the local laws, rules, and customs of miners in said California mining district and the statutes of the United States and of the State of Colorado concerning mineral lands, and denies that the plaintiff had been or was or now is so entitled to the ownership and possession of said premises in any other way or manner or by any other means whatsoever.

Denies that the plaintiff was at the commencement of this
7 action or is now entitled to the possession of said Adelaide mining claim or any part thereof.

Denies that said claim is of great value, and that it is of the value of five hundred thousand dollars.

Admits that the plaintiff is a citizen of the State of Colorado, and that this defendant is a corporation and citizen of the State of Missouri and authorized by virtue of a compliance with the laws, rules, and regulations of the State of Colorado to do business in said State.

Denies that on, to wit, the 2d day of October, or at any other time, this defendant forcibly or unlawfully entered on said Adelaide Lode mining claim, or wrongfully or unlawfully ousted the plaintiff from the possession of the same or any part thereof, or wrongfully or unlawfully withheld, or thence hitherto, or now unlawfully or wrongfully withholds, the possession of said premises or any part thereof from the plaintiff, to the damage of the plaintiff in the sum of twenty-five thousand dollars or any other sum.

And this defendant, further answering, says that by virtue of patents duly obtained from the Government of the United States it is, and long prior to the 2d day of October, 1880, had been, the owner in fee of the two certain mining claims situated in said California mining district, which said claims so owned by this defendant are known as the Pine and Camp Bird Lode claims, and lie parallel and adjoining each other and adjoining to said so-called Adelaide Lode mining claim, and that long prior to the alleged entry by this defendant upon the said so-called Adelaide Lode mining claim this defendant and its grantors discovered a lode, ledge, or vein
8 of mineral, bearing silver and lead, in rock in place, in the said Pine and Camp Bird Lode claims, the top or apex of which was within the exterior lines of such lode claims, and that the general strike and course of such lodes and the apex thereof is a little north of east and south of west and across the said lode claims at an angle; and that defendant has for a long distance, to wit, the distance of over 500 feet, followed, explored, and exposed the top or apex of said lode within the boundaries of its claims aforesaid; and that the said lode has a dip or inclination to the east or easterly at right angles to its course and strike of about 14° from the horizon; and that defendant for a long time prior to the 2d day of October, 1880, to wit, since some time in the year 1877, had been engaged in following, developing, mining, and taking the ore from

such vein, lode, or ledge, and had run numerous drifts, sunk numerous shafts, and made many and various openings upon said vein, lode, or ledge, and that throughout all such openings and explorations said lode, ledge, or vein was well defined [and] continuous, lying between an upper or hanging wall of porphyry and a lower or foot wall of quartzite, and carrying at all times and places large quanti-es of silver-bearing ore, and that in prosecuting its work on said lode, ledge, or vein, and on the downward course thereof from its apex, defendant mined and drove the said drift through the side line of said pretended Adelaid- claim, if the same were carried down vertically at a great depth below the surface, to wit, at a depth of one hundred and fifty feet, and continued said drift forward and into said claim.

9 And defendant avers that such shaft and other openings made by defendant were and are on the lode, ledge, or vein of this defendant, the top or apex of which was exposed within the surface lines of its property; and that it has throughout the entire distance followed continuously the same lode, ledge, or vein and not another and different one; and that the same is large, strong, and well defined, carrying at all times large quantities of silver-bearing ore, and that said lode in [its] downward and onward course so far departs from a perpendicular that it cut and passed through the side line of the pretended Adelaide claim and into its territory aforesaid, and that the supposed entry of this defendant was by following said lode on its dip and not otherwise; and that at the time and for some time after this defendant had driven the said drift through the side line of said Adelaide claim and into its territory neither plaintiff, his grantors, nor any one else had any workings or openings in that part of the Adelaide claim cut and entered by said drift as low down and at as great depth as the drift of this defendant, and the workings (if any there were) of parties in possession of said Adelaide claim [were] at a level considerably above the said drift.

And defendant says that the entry so made and possession so taken by defendant in mining and drifting as aforesaid are the same identical entry and possession complained of in said complaint and not other or different, and that the same were made and taken

10 in pursuance of the lawful rights of this defendant as the owner of said Pine and Camp Bird Lode claims, and as *to* the owner and party lawfully entitled to the possession of said lode or vein and of the ores within the same and beyond the surface lines of said Adelaide Lode mining claim vertically extended downward.

(S'g'd) DIXON & REED,
Def't's Att'ys.

Endorsed: No. 594. In the circuit court of the United States. Frederick S. Van Zandt, trustee, *vs.* The Argentine Mining Company. Answer. Filed Nov. 27, 1880. (S'g'd) Edward F. Bishop, clerk. Dixon and Reed, def't's att'ys.

And afterwards and on, to wit, the 29th day of November, A. D. 1880, came again the said plaintiff, by his attorneys aforesaid, and filed in said court and in said cause his petition for leave to survey and inspect the property in controversey herein, and the said petition is in words and figures as follows, to wit:

Petition for Leave to Survey and Inspect Property.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the Eighth Judicial Circuit of the United States within and for said District.

11 FERDINAND S. VAN ZANDT, Trustee,

versus

THE ARGENTINE MINING COMPANY.

Your petitioner, Ferdinand S. Van Zandt, the above-named plaintiff, respectfully represents that he is the owner, as trustee, and in possession of the Adelaide Lode mining claim, situate in California mining district, county of Lake, and State of Colorado.

That the defendant is the owner of the Camp Bird, Charleston, Keystone, and other mines, also in said district, county, and State; that a portion of said Adelaide Lode mining claim and all of the said last-mentioned mines are in the possession of the Argentine Mining Company, and that this suit is brought for the purpose of recovering possession of that part of the said Adelaide Lode mining claim which is in the possession of the said defendant.

That the said defendant claims the right to enter and possess itself of the vein, lode, ledge, and deposit in the said Adelaide claim by virtue of its ownership and possession of the outcrop, top, or apex of the said vein, and that the said outcrop, top, or apex is situate in the mines aforesaid of the defendant or some one or more of them, and that it so far departs from a perpendicular in its course downward as to enter into the lands adjoining, to wit, the Adelaide Lode mining claim.

That the plaintiff denies that the defendant possesses the apex or outcrop of said lode or of any lode whatsoever, and that it has no right whatsoever to -respass on the premises of the plaintiff.

12 That for the ascertainment, enforcement, and protection of the plaintiff's right and interest to said Ad-laide Lode mining claim and to the veins therein contained, it is necessary that an examination, inspection, and survey of the Keystone, Camp Bird, Charleston, and Pine Lode mining claims should be had and made, together with all the underground workings thereof.

That such inspection, examination, and survey of said mines and of the workings thereof as aforesaid will demonstrate that the said defendant does not possess in any of said mines or in any mine whatsoever the outcrop, top, or apex of the vein or lode contained in the Adelaide Lode mining claim, and that it has no right what-

soever to enter the premises bounded by the exterior lines of the said Adelaide Lode mining claim for any purpose whatsoever.

That on, to wit, the 18th day of October, A. D. 1880, your petitioner served a written demand *in writing* upon James Brierton, the agent, superintendent, and manager of and for said defendant company, for permission to make such inspection, examination, and survey.

That the said James Brierton, through J. R. Loker, acting superintendent, then and there consented that such inspection, examination, and survey should be made and had, as will be seen by Exhibit A, hereto attached and made a part and parcel of this petition and signed by J. R. Loker, acting superintendent.

That in pursuance of said consent and on or about, to wit, the 20th day of October, A. D. 1880, the witnesses and surveyors of the plaintiff made a partial survey of that part of the underground workings of the defendant situate within the exterior lines of the Ad-laide Lode mining claim.

13 That at said time the plaintiff gave a written consent to T. Conners, foreman of said Argentine Mining Company, on behalf of the defendant, permitting the said defendant to inspect, examine, and survey the workings of the plaintiff in said Adelaide Lode mining claim, which consent remained in full force until the defendant revoked its order or permit of inspection.

That on, to wit, the 18th day of November, A. D. 1880, in pursuance of said demand and consent by said defendant, your petitioner was notified by J. R. Loker, who signs himself acting superintendent, that admission to the defendant's property was recalled, and that if petitioner desired access he would have to obtain the order of this honorable court.

That in consequence your petitioner has been unable to enter the same, and he therefore asks this honorable court for an order permitting him, with his witnesses, in manner and form as provided by the statute in such cases made, to enter upon the said Pine, Camp Bird, Charleston, and Keystone Lode claims, situate on south side of Stray Horse gulch, in California mining district, county of Lake, and State of Colorado, and to inspect, examine, and survey the same and all and singular the underground workings, drifts, tunnels, inclines, winzes, and so forth, and that he and his said witnesses may be permitted to take such samples of ore or other rock from said workings as may be necessary to demonstrate the location of said vein and the continuity and completeness thereof, and that the said defendant be ordered to admit plaintiff and his said witnesses,

14 surveyors, and so forth, without let or hinderance whatsoever, until the said inspection shall be finished and completed.

(S'g'd) FERDINAND S. VAN ZANDT.

DISTRICT OF COLORADO, } *ss:*
County of Lake, }

Personally appeared Ferdinand S. Van Zandt, who, being by me first duly sworn according to law, deposes and says that he is the petitioner named in the above and foregoing petition, and that the

same is true of his own knowledge, save as to the matters and things therein stated on information and belief, and that as to those matters and things he believes them to be true.

(S'g'd) FERDINAND S. VAN ZANDT.

Subscribed and sworn to before me this 20th day of November, A. D. 1880.

[SEAL NOTARIAL.] (S'g'd) D. CLINTON LYLES,
Notary Public.

Edwin Harrison, president; Arthur H. Meyer, metallurgist; G. H. Loker, Jr., secretary.

Harrison Reduction Works. Branch works of the St. Louis Smelting and Refining Company of St. Louis, Mo.

LEADVILLE, COLORADO, *Oct. 19th*, 1880.

Terry Connors, foreman Argentine Mining Co.

SIR: You will permit the sup't and foreman of the Ad-laide, with two surveyors and their assistants, to examine and survey the Argentine mine from time to time until you are further notified.

Yours, (S'g'd) J. R. LOKER, *A. Sup't.*

15 Endorsed: 594. F. S. Van Zandt, trustee, *vs.* The Argentine Mining Company. Application, &c., for leave to inspect mines. Filed Nov. 29, 1880. (S'g'd) Edward F. Bishop, clerk. Thomas & Campbell, atty's for pl'ff.

And afterwards and on, to wit, the same day, to wit, the 29th day of November, A. D. 1880, the same being one of the regular juridical days of the October term, A. D. 1880, of said court, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order for Survey, etc.

FREDERICK S. VAN ZANDT, Trustee,
vs.
THE ARGENTINE MINING COMPANY.

For possession of specific real property, &c.

This day this cause came on to be heard upon the application of the plaintiff for an order to inspect the mines and underground workings of the defendant, and due notice having been given of this application upon proper petition and showing:

It is ordered and adjudged by the court that for the purpose of examination and survey of the "Pine," "Camp Bird," Charles-
16 ton, and Keystone Lode mining claims and the underground workings of said lode mining claims there shall be permitted to enter upon and into said premises and underground workings thereof, to make such surveys, inspection, and examination as the plaintiff may deem necessary, two surveyors or mining engineers with necessary instruments; two assayors, who shall have the prive-

lege of taking samples of ore or mineral from any part of said premises for the purpose of assaying the same, and three other witnesses for the purpose of examination and inspection; and the said surveyors are not limited as to the time for doing their work, and the assessors and other witnesses shall have the privilege of entering said mines and premises for six days consecutively, the time and date when said assessors and witnesses shall commence to enter to be given in writing three days before such entry to one of the defendant's attorneys of record, and the said six days shall commence to run from the date mentioned in said notice; that before such surveyors, assessors, or witnesses shall commence the examination, &c., of said premises, the names of such surveyors, assayers, and other witnesses shall be furnished in writing to some one of the defendant's attorneys of record, and the defendant may refuse to admit any others, and that the plaintiffs may cause any lagging débris or obstructions to be removed, if necessary for the proper examination and inspection of said premises, by replacing any lagging or timber so removed.

And it is further ordered and adjudged that the defendant
17 may make examination of and survey the premises known as the Adelaide Lode mining claim and all the openings therein in all respects in the same manner and with the same number and kind of witnesses, and subject to the same terms, conditions, and restrictions as are allowed to and imposed upon the plaintiff by this order.

And afterwards and on, to wit, the 14th day of December, A. D. 1880, came again the said plaintiff, by his attorneys aforesaid, and filed in said court and in said cause his reply to the answer heretofore filed herein, and the said reply is in words and figures as follows, to wit:

Replication to Answer.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the Eighth Judicial Circuit in and for said District.

FERDINAND S. VAN ZANDT, Trustee,

vs.

THE ARGENTINE MINING COMPANY, Def't.

The plaintiff replies to the answer of the defendant hereinabove filed and alleges:

It admits that, by virtue of certain patents duly obtained, &c., from the Government of the United States, it was on the 2d day of October, A. D. 1880, and prior thereto had been the owner in fee of and to the Pine and Camp Bird Lode mining claims, situate
18 in California mining district, county of Lake, and State of Colorado, and that they, the said claims, adjoin each other, but that the said claims intersect the surface location of said Ade-

laide claim, and that the area so intersected and in conflict is excepted from the grant of said patents to said lodes.

And the plaintiff denies that long prior, or at any time prior, to the entry and trespass of the defendant upon said Adelaide Lode claim, as set forth and described in the complaint filed in *the complaint filed in* this cause, it, the said defendant, or its grantors, or any of them, had discovered any ledge, lode, or vein of mineral, bearing silver, lead, or any other metal, in rock in place in the said Pine and Camp Bird Lode claims or either of them, with its top or apex within the exterior lines of said lode claims or either of them.

The plaintiff, further replying, denies that the general strike or course of such pretended lodes or the apex thereof is a little north of east and south of west, or that they have any strike, course, top, or apex whatever within said lode claims; and he further denies that the defendant has, for the distance of 500 feet or for any distance whatsoever, followed, explored, or exposed the top or apex of said lode or of any lode within the boundaries of said pretended claims or either of them; and he denies that the said pretended lode has a dip or inclination to the east or easterly, or in any other direction, at right angles to its pretended course or strike, or at any other angle, of fourteen or any other number of degrees from the horizon.

The plaintiff admits that since the year A. D. 1877 the de-
19 fendant has been engaged in mining and developing on its said lode claims and taking ore therefrom, but denies that it has done said work and development on any defined or existing vein or lode of mineral whatsoever. He denies that the defendant, by means of its said developments on said lode claims, has exposed any well-defined and continuous lode or vein between a hanging wall of porphyry and a foot wall of quartzite, or between any substances or rocks of any kind, or that it carries throughout quantities of silver-bearing ore. And the plaintiff denies that in prosecuting work from the apex of any lode or vein the defendant mined and drove its drift on any vein or lode whatsoever through the side lines of the Adelaide Lode claim, but avers that said drift was driven through the rock formation of the hill or mountain into and upon the ore bodies of the plaintiff's mine.

The plaintiff, further replying, denies that the shaft and other openings made by defendant are on any lode, ledge, or vein whatever, or that the top or apex of such vein anywhere exists within the exterior boundaries of said Pine and Camp Bird Lode claims or either of them, or that it has throughout the entire distance or any part thereof followed the same or any lode, ledge, or vein, or that the same is continuous or well defined, or that such pretended lode, in downward and onward or any course, so far departs from a perpendicular that it cuts or passes through the side line or any line of the plaintiff's mining claim and into the territory of said claim, or that the entry of the defendant into and upon the plaintiff's
20 said mining claim was by following such pretended vein on its said pretended dip.

And the plaintiff denies that at the time of the said wrong-

ful entry of the defendant into and upon the said Adelaide Lode mining claim neither he nor his grantors had any workings or openings in that part of the Adelaide claim as low down as that of the defendant, but, on the contrary, avers that he had openings and workings of the Adelaide Lode mining claim extending beneath the drift, made by defendant in its alleged trespass, to the depth of fully one hundred feet.

Wherefore the plaintiff prays judgment in accordance with the prayer of his complaint as hereinbefore filed.

(S'g'd) THOMAS & CAMPBELL,
Att'ys for Def't.

By MARKHAM & PATTERSON,
Of Counsel.

Endorsed: 594. F. S. Van Zant *vs.* Argentine M. Co. Reply of pl'ffs. Filed Dec. 14, 1880. (S'g'd) Edward F. Bishop, clerk. Thomas & Campbell, for pl'ff.

And afterwards and on, to wit, the 13th day of June, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

21 *Order. Trial Commenced.*

FREDERICK S. VAN ZANDT, Trustee,
vs.
THE ARGENTINE MINING COMPANY.

For possession of specific real property and for damages.

At this day comes the said plaintiff, by Messrs. C. S. Thomas, T. M. Patterson, J. B. Belford, V. D. Markham, and Clinton Reed, his attorneys, and the said defendant, by Messrs. G. B. Reed and H. C. Thatcher, its attorneys, also comes; and thereupon comes a jury, to wit: 1, J. W. Bostwick; 2, Charles C. Welch; 3, Samuel Copeland; 4, F. A. Buse; 5, Joseph Holman; 6, Matthew McLaughlin; 7, John N. Gabathuler; 8, Elias Goldman; 9, J. E. Billings; 10, J. W. Fassett; 11, J. W. Chatfield; 12, David Briggs, good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and truly try the issue herein joined and a true verdict give according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment, when the further hearing herein is postponed until to-morrow, Tuesday, the 14th instant, at the hour of 9.30 o'clock a. m.

And the said jurors, being each duly cautioned by the court not to converse among themselves nor with others touching this cause, or the matters at issue herein, or the evidence heard or any — thereof, nor to listen to such conversation of others, nor to read or hear read any publication touching the same, are permitted to separate to meet the court as aforesaid.

22 And afterwards and on, to wit, the 14th day of June, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial Continued. Motion for Nonsuit Denied. Plaintiff Granted Leave to Amend Complaint. Complaint Dismissed as to Damages.

FREDERICK S. VAN ZANDT, Trustee,

vs.

THE ARGENTINE MINING COMPANY.

For possession of specific real property, &c.

At this day come again the said parties, by their attorneys respectively, and the said jurors being now all here, present, and in the jury-box, the hearing of the evidence herein is resumed.

And thereupon, the said jurors having heard the evidence produced herein on behalf of the said plaintiff, the said defendant moves the court for judgment as in case of nonsuit, which is argued by counsel, and, the court being now sufficiently advised in the premises, it is ordered by the court that the said motion be denied; and on motion of the said plaintiff he is allowed to amend his complaint to show that he demands only two-thirds interest undivided in the premises therein described.

And thereupon the said plaintiff in open court, as to the damages by him demanded in his said complaint, says he will no further prosecute his suit.

And thereupon the hearing of the evidence herein is resumed and continued to the hour of adjournment, when the further hear-
23 ing herein is postponed until to-morrow, Wednesday, the 15th instant, at the hour of 9.30 o'clock a. m.

And the said jurors being each duly cautioned by the court not to converse among themselves nor with others touching this cause or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication touching the same, are permitted to separate to meet the court as aforesaid.

And afterwards and on the same day, to wit, the 14th day of June, A. D. 1881, came again the said defendant, by its attorneys aforesaid, and filed in said court and in said cause *his* motion for judgment of nonsuit; and the said motion is in words and figures as follows, to wit:

Motion for Nonsuit.

UNITED STATES OF AMERICA, }
State of Colorado, } *ss:*

In the Circuit Court of the United States for the District of Colorado.

F. S. VAN ZANDT *vs.* ARGENTINE MINING COMPANY.

And now comes the defendant and moves the court to enter a judgment of nonsuit for the following good and sufficient reasons:

1st. There is no evidence to support a verdict.

2d. The plaintiff has failed to prove a discovery as by law required.

24 3d. The plaintiff has failed to establish that any lode or vein extends from his said pretended discovery shaft to the ground which the evidence shows the defendant was in possession of at the time the suit was brought.

4. It is established by the testimony of the plaintiff that he at no point entered upon the top or apex of a lode, vein, or deposit in controversy herein, but that at all points has cut and intersected the same at a considerable depth below the surface, and when so cutting and intersecting said lode, vein, or deposit has not followed the same on its downward course, but followed the same in its upward course to and into the ground in possession of the defendant.

5. The complaint declares for the entire premises: the evidence shows conclusively that plaintiff is not the owner of more than two-thirds, if he has any interest whatever therein.

6. The evidence does not show that the discovery shaft disclosed a "well-defined crevice," *on* that the mineralized matter found therein contained anything of value, carrying one ounce or more of silver to the ton.

7. The evidence does not show that the claim was staked as by law required; that posts or stakes were sunk in the ground at the center of the side lines.

(S'g'd) G. B. REED,
H. C. THATCHER,
Att'ys for Defendants.

Endorsed: 594. Circuit court. Fred. S. Van Zandt, trustee, *vs.* Argentine Min'g Co. Mo. for nonsuit. Filed June 14, A. D. 1881. (S'g'd) Edward F. Bishop, clerk. H. C. Thatcher.

25 And afterwards and on, to wit, the 15th day of June, A. D. 1881, came again the said plaintiff by his attorneys aforesaid and filed in said court and in said cause his amended complaint against the said defendant. And the said amended complaint is in words and figures as follows, to wit:

Amended Complaint.

UNITED STATES OF AMERICA, }
District of Colorado, } ss.

In the Circuit Court of the Eighth Judicial Circuit in and for said District.

FERDINAND S. VAN ZANDT, Trustee, Pl'ff,
vs.
THE ARGENTINE MINING COMPANY, Def't.

The plaintiff, by leave of the court first had and obtained, filed this his amended complaint and alleges:

That he is the owner of an undivided two-thirds interest of, in, and to the Adelaide Lode mining claim, situate in California mining district, county of Lake and State of Colorado, known and described as follows: Beginning at corner No. 1, a pine post, being northwest corner of same, from which discovery post and shaft bears south 14° 45′ east 201 feet (variation in all courses 15° east), and U. S. locating monument No. 11. established April 25th, 1877, by Charles W. Milburn and W. A. Bradt, U. S. deputy mineral surveyors bears S. 18° 21′ W. 1,556 feet; and the said monument No. 11 bears N. 25° 47′ E. 1,703.9 feet from corner No. 5, survey No. 232; thence S. 33° 30′ W. 750 feet to stake, 1,500 ft. to corner No. 26 2; thence S. 51° E. 300 ft. to corner No. 3; thence N. 33° 30′ E. 750 ft. to stake, 1,500 ft. to corner No. 4; thence N. 51° W. 300 ft. to place of beginning.

That the plaintiff has been and is entitled to the possession of said premises and to the ownership of said undivided two-thirds interest therein by virtue of a full compliance by himself and his grantors with the local laws, rules, and customs of miners in said California mining district and the statutes of the United States and of the State of Colorado concerning mineral lands.

That the plaintiff is a citizen of the State of Colorado and the defendant is a corporation and citizen of the State of Missouri and authorized by virtue of a compliance with the local laws, rules, and regulations of the State of Colorado to do business in said State.

That the said mining claim is of great value, to wit, of the value of five hundred thousand dollars.

That on, to wit, the second day of October, 1880, the defendant forcibly and unlawfully entered on said Adelaide Lode mining claim and wrongfully and unlawfully ousted the plaintiff from the possession thereof, and wrongfully and unlawfully withheld and still does wrongfully and unlawfully withhold possession of said premises from the plaintiff, to his damage in the sum of twenty-five thousand dollars. Wherefore the plaintiff prays judgment:

1. For the sum of twenty-five thousand dollars damages, as aforesaid.
2. For the recovery of possession of said above-described premises.
3. For the costs of this suit.

(S'g'd) MARKHAM, PATTERSON & THOMAS,
BELFORD & REED, *Att'ys for Pl'ff.*

27 Endorsed: 594. F. S. Van Zandt *vs.* Argentine Mining Co. Amended complaint. Filed Jun. 15, 1881. (S'g'd) Edward F. Bishop, clerk. Markham, Patterson & Thomas, Belford & Reed.

And afterwards and on, to wit, the same day, to wit, the 15th day of June, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial Continued.

FREDERICK S. VAN ZANDT, Trustee,

vs.

THE ARGENTINE MINING COMPANY.

For possession of specific real property.

At this day come again the said parties, by their attorneys respectively, and the said jurors being now all here present and in the jury-box the hearing of the evidence herein is resumed and continued to the hour of adjournment, when the further hearing herein is postponed until to-morrow, Thursday, the 16th instant, at the hour of 9 o'clock a. m.

28 And the said jurors being each duly cautioned by the court not to converse among themselves nor with others touching this cause or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation of others, nor to read or hear read any publication touching the same, are permitted to separate to meet the court as aforesaid.

And afterwards and on, to wit, the 16th day of June, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial Continued. Verdict for Plaintiff.

FREDERICK S. VAN ZANDT, Trustee,

vs.

THE ARGENTINE MINING COMPANY.

For possession of specific real property.

At this day come again the said parties, by their attorneys respectively, and the said jurors being all here present and in the jury-box the hearing herein is resumed.

And the said jurors, having heard the evidence produced herein and the instructions of the court, retire to their room to consider of their verdict.

And afterward and on this same day come again the said jurors, and on their oaths do say they find the issues for the plaintiff, and that he is the owner of one undivided two-thirds interest in the premises described in the complaint and entitled to the possession of the same.

29 And afterwards and on, to wit, the 17th day of June, A. D. 1881, came again the said defendant, by its attorneys aforesaid, and filed in said court and in said cause its motion for a new trial of the issues herein joined; and the said motion is in words and figures as follows, to wit:

Motion for New Trial.

UNITED STATES OF AMERICA, }
State of Colorado, } ss:

In the Circuit Court of the United States for the District of Colorado, sitting at Denver.

F. S. VAN ZANDT, Trustee, Plaintiff,
vs.
THE ARGENTINE MINING COMPANY, Defendant.

And now comes the defendant, by G. B. Reed and H. C. Thatcher, its attorneys, and moves the court to set aside the verdict of the jury and for a new trial in this cause, because—

1st. The verdict of the jury is manifestly against the evidence and the weight of evidence.

2d. The verdict of the jury is wholly without any evidence to support it.

3d. The jury disregarded the instructions of the court.

4th. The verdict is contrary to the law of the case.

5th. The counsel for the plaintiff, especially in their closing argument to the jury, appealed to prejudices totally foreign to the case in evidence, and base their argument upon facts not appearing,
30 and thereby improperly influenced the jury by creating issues of his own outside of the case, and concerning which no proof had been received, and by means of such illegitimate course of argument entirely diverted the minds of the jurors from the real facts as proved.

5th. The court erred in refusing to grant the motion for judgment of nonsuit.

6th. Because [in] the closing argument of plaintiff's counsel he dwelt upon the alleged fact that defendants had taken large bodies of ore from the plaintiff's property, which was untrue and not supported by any evidence whatever.

7th. Because in the closing argument of plaintiff's counsel he, going outside of the record, vilified and slandered the officers and agents of defendants, charging them with having committed robbery, larceny, and other crimes, and misrepresented their acts and motions with the intention of creating prejudice against the defend-

ant in the minds of the jury and preventing it from obtaining its legal rights.

(S'g'd) G. B. REED,
H. C. THATCHER,
Att'ys for Defendant.

Endorsed: 594. F. S. Van Zandt, trustee, *vs.* The Argentine Mining Company. Motion for new trial. Filed Jun. 17, 1881. (S'g'd) Edward F. Bishop, clerk. G. B. Reed, H. C. Thatcher, att'ys for defendant.

31 And afterwards and on, to wit, the 14th day of July, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Motion for New Trial Denied. Judgment on Verdict.

FREDERICK S. VAN ZANDT, Trustee,
vs.
THE ARGENTINE MINING COMPANY.

For possession of specific real property and damages.

At this day comes the said plaintiff, by C. S. Thomas, Esq., his attorney, and the said defendant, by G. B. Reed, Esq., its attorney, also comes, and the motion of the said defendant for a new trial of the issues herein joined having heretofore come on to be heard and having been argued by counsel, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore let judgment be entered herein upon the verdict of the jury in favor of the said plaintiff and against the said defendant.

And thereupon and on the same day, to wit, the 14th day of July, A. D. 1881, judgment was duly entered against the said defendant in the judgment book of said court and in said cause in pursuance of the statutes and rules of court; and the said judgment is in words and figures as follows, to wit:

32 *Judgment.*

FREDERICK S. VAN ZANDT, Trustee,
vs.
THE ARGENTINE MINING COMPANY.

For possession of specific real property and for damages.

On this 14th day of July, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court, there being present the Honorable Moses Hallett, district judge, it is considered by the court that the said plaintiff do have and recover of and from the said defendant an undivided two-thirds interest of, in, and to the Adelaide Lode mining claim, beginning at

corner No. 1, a pine post, being northwest corner of same, from which discovery post and shaft bears south 14° 45′ east 201 feet (variation in all courses, 15° east), and U. S. locating monument No. 11, established April 25th, 1877, by Charles W. Milburn and W. A. Bradt, U. S. deputy mineral surveyor, bears S. 18° 21′ W. 1,556 feet, and the said monument No. 11 bears N. 25° 47′ E. 1,703.9 feet from corner No. 5, survey No. 232; thence S. 33° 30′ W. 750 feet to stake 1,500 feet to corner No. 2; thence S. 51° E. 300 feet to corner No. 3; thence N. 33° 30′ E. 750 ft. to stake 1,500 ft. to corner No. 4; thence N. 51° W. 300 ft. to place of beginning, situate in California mining district, county of Lake, and State of Colorado, and that he have a writ of possession therefor.

It is further considered by the court that the said plaintiff do have and recover of and from the said defendant his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor.

33 And afterwards and on, to wit, the 23d day of September, A. D. 1881, came again the said defendant, by its attorneys aforesaid, and filed in said court and in said cause its motion to set aside the judgment and grant a new trial of the issues herein joined, and the said motion is in words and figures as follows, to wit:

Motion to Set Aside Judgment and Grant New Trial.

UNITED STATES OF AMERICA, *State of Colorado:*

In the United States Circuit Court, District of Colorado.

FREDERICK S. VAN ZANDT
vs.
THE ARGENTINE MINING CO.

Ejectment.

The defendant in the above-entitled cause, by Thatcher & Gast & G. B. Reed, its attorneys, now comes and informs the court that all costs of former trial have been heretofore paid, and moves the court to vacate and set aside the judgment heretofore rendered, and that a new trial be granted according to the provisions of the statute in such case made and provided.

(S'g'd) THATCHER & GAST AND G. B. REED,
Att'ys for Def'ts.

[Endorsed:] 594. United States circuit c't, district of Colorado Frederick S. Van Zandt *vs.* The Argentine Mining Co. Motion to set aside judgment and for new trial. Filed Sep. 23, 1883. (S'g'd) Edward F. Bishop, clerk.

34 And afterwards and on, to wit, the 7th day of October, A. D. 1881, came again the said plaintiff, by his attorneys, and filed in said court and in said cause his motion to vacate order setting aside judgment, and the said motion is in words and figures as follows, to wit:

Motion to Vacate Order Setting Aside Judgment.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the United States.

F. S. VAN ZANDT *vs.* ARGENTINE MINING CO.

And now comes the plaintiff, by Markham, Patterson and Thomas, his attorneys, and moves the court to set aside the order heretofore, and on the 5th day of October, A. D. 1881, made setting aside the judgment heretofore and at the last term of this court entered in this case, and granting the defendant another trial, for the following reasons:

First. Because the said defendant did not voluntarily pay the costs of the first and former trial of this case, as is required by the statute to entitle the defendant to a second trial as a statutory right, but the said costs were collected by execution only.

Second. Because the said defendant did refuse to pay the costs of the first and former trial, and after such refusal said costs were collected by the marshal of this court by force and virtue of an execution issued out of this court.

35 (S'g'd) MARKHAM, PATTERSON & THOMAS,
For Pl'ff.

Endorsed: 594. U. S. C. C. F. S. Van Zandt *vs.* Argentine Min'g Co. Motion to vacate order setting aside judgment. Filed Oct. 7, 1881. (S'g'd) Edward F. Bishop, clerk. Markham, Patterson & Thomas, for pl'ff.

And afterwards and on, to wit, the 11th day of October, A. D. 1881, the same being one of the regular juridical days of the October term, A. D. 1881, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Judgment Vacated and New Trial Granted.

FREDERICK S. VAN ZANT, Trustee,
vs.
THE ARGENTINE MINING COMPANY.

For possession, etc.

At this day comes the said plaintiff, by V. D. Markham, Esq., his attorney, and the said defendant, by H. C. Thatcher, Esq., its attorney, also comes.

And the motion of the said plaintiff that the judgment of the court herein be vacated, and that a new trial herein be granted, having heretofore come on to be heard, and having
36 been argued by counsel and taken under advisement by the court, and the court being now sufficiently advised in the premises, it is ordered by the court that the said motion be granted.

Wherefore it is ordered by the court that the judgment of the court lately and on the 14th day of July last had herein be vacated and for naught held, and that a new trial of the issues herein joined be had, in pursuance of the statute in such case made and provided.

And afterwards and on, to wit, the 9th day of May, A. D. 1883, came again the said plaintiff, by V. D. Markham, Esq., his attorney, and filed in said court and in said cause a certain stipulation making the Terrible Mining Company plaintiff herein, and the said stipulation is in words and figures as follows, to wit:

Stipulation Substituting the Terrible Mining Company as Plaintiff.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the Eighth Judicial Circuit of the United States within and for said District.

F. S. VAN ZANDT, Trustee, &c.,

vs.

THE ARGENTINE MINING COMPANY.

It is stipulated by and between the parties to this cause
37 that the Terrible Mining Company, having acquired title to and possession of the Adelaide Lode claim, the property in dispute in this cause, since the first trial of the issues herein joined, the said company may be substituted as party plaintiff herein and the said cause may be tried as to the entire interest claimed as though the said company had been the party plaintiff herein from the commencement herein. Nothing in this stipulation shall be construed as an admission by the defendant of the validity of the plaintiff's title as against the claim of the defendant.

(S'g'd) MARKHAM, PATTERSON & THOMAS,
Attorneys for Plaintiff.

(S'g'd) THATCHER & GAST, *Att'ys for Defendant.*

Endorsed: 594. F. S. Van Zandt, trustee, *vs.* The Argentine Mining Co. Stipulation. Filed May 9, 1883. (S'g'd) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 5th day of November, A. D. 1883, came again the said plaintiff, by its attorneys aforesaid, and filed in said court and in said cause its amended complaint against the said defendant, and the said amended complaint is in words and figures as follows, to wit:

38 *2d Amended Complaint.*

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

In the Circuit Court of the Eighth Judicial Circuit of the United States in and for said District.

THE TERRIBLE MINING CO. *vs.* THE ARGENTINE MINING CO.

By the terms and conditions of the stipulation hereinbefore filed in this cause substituting the above-named plaintiff for Frederick S. Van Zandt, trustee, the plaintiff complains and alleges—

That it is the owner of the Ad-laide Lode mining claim, situate in California mining district, county of Lake, and State of Colorado, known and described as follows: Beginning at corner No. 1, a pine post, being northwest corner of same, from which discovery post and shaft bears S. 14° 45′ E. 201 feet (variation in all courses 15° E.), and U. S. locating monument No. 11, established April 25th, 1877, by Charles W. Milburn and W. H. Bradt, U. S. deputy mineral surveyors, bears S. 18° 21′ W. 1,556 feet, and the said monument No. 11 bears N. 25° 47′ E. 1,703.9 feet from corner No. 5, survey No. 232; thence S. 23° 30′ W. 750 feet to stake 1,500 ft. to corner No. 2; thence S. 51° E. 300 ft. to corner No. 3; thence N. 33° 30′ E. 750 ft. to stake 1,500 ft. to corner No. 4; thence N. 51° W. 300 feet to place of beginning.

That the plaintiff has been and is entitled to the ownership
39 and possession of said premises by virtue of a compliance by itself and its grantors with the local laws, rules, and customs of miners in said California mining district and the statutes of the United States and of the State of Colorado concerning mineral lands (*and by virtue of a receiver's receipt issued from the proper land office of the United States therefor); that the plaintiff is now entitled to the possession of said Adelaide mining claim, and each and every part thereof.

That said mining claim is of great value, to wit, of the value of five hundred thousand dollars.

That the plaintiff is a corporation and citizen of the State of New York, and the defendant is a corporation and citizen of the State of Missouri and authorized by virtue of a compliance with the local laws, rules, and regulations of the State of Colorado to do business in said State.

That on, to wit, the second day of October, A. D. 1880, the defendant forcibly and unlawfully entered on said Ad-laide Lode mining claim and wrongfully and unlawfully ousted the plaintiff from the possession thereof, and wrongfully and unlawfully withheld, and still does wrongfully and unlawfully withhold, possession of said premises from the plaintiff, to its damage in the sum of twenty-five thousand dollars. Wherefore the plaintiff prays judgment—

1. For the sum of twenty-five thousand dollars damages.

*Struck out, page 3, lines 14, 15, 16, 17, & 18.

2. For the recovery of possession of said above-described premises
3. For the costs of suit, to be taxed.

(S'g'd) J. D. WARD &
MARKHAM, PATTERSON & THOMAS,
Att'ys for Pl'ff.

40 Endorsed: 594. U. S. circuit court. The Terrible Mining Company, pl'ff, *vs.* The Argentine Mining Co., def't. Amended complaint. Filed Nov. 5, 1883. (S'g'd) Edward F. Bishop, clerk. J. D. Ward & Markham, Patterson & Thomas, for pl'ff.

And afterwards and on the same day, to wit, the 5th day of November, A. D. 1883, the same being one of the regular juridical days of the October term, A. D. 1883, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Motion to Strike Out Part of Amended Complaint Granted.

THE TERRIBLE MINING COMPANY
vs.
THE ARGENTINE MINING COMPANY.

For possession of specific real property and for damages.

At this day comes the said plaintiff, by C. S. Thomas, Esq., its attorney, and the said defendant by G. B. Reed, Esq., its attorney, also comes.

And thereupon, on motion of the said defendant, it is ordered by the court that the words "and by virtue of a receiver's receipt issued
41 from the proper land office of the United States therefor," on the third page, and fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth lines thereof, in the second amended complaint filed this day, be stricken out and for naught held.

And afterwards and on the same day, to wit, the 5th day of November, A. D. 1883, the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Second Trial Commenced.

TERRIBLE MINING COMPANY
vs.
THE ARGENTINE MINING COMPANY.

For possession of specific real property, &c.

At this day comes the said plaintiff, by C. S. Thomas, Esq., its attorney, and the said defendant, by G. B. Reed, Esq., its attorney, also comes; and thereupon comes a jury, to wit: 1, J. W. Livers; 2, Thomas Brown; 3, Samuel Taylor; 4, Herman Holst; 5, Henry W. Larraway; 6, Oscar Ennis; 7, George L. Iles; 8, J. W. Sullivan; 9, W. D. Arnett; 10, Bernard McKenna;

11, S. N. Bennett; 12, William Barnett, twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence. And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being each duly cautioned by the court not to converse among themselves or with others touching this
42 cause or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

And afterwards and on, to wit, the 6th day of November, A. D. 1883, came again the said defendant, by its attorneys aforesaid, and filed in said court and in said cause its answer to the second amended complaint heretofore filed herein, and the said answer is in words and figures as follows, to wit:

Answer to Second Amended Complaint.

In the Circuit Court of the United States for the District of Colorado.

THE TERRIBLE MINING COMPANY
vs.
THE ARGENTINE MINING COMPANY.

The defendant, for answer to the amended complaint of the plaintiff in this action, says that he denies that the plaintiff is the owner of the Adelaide Lode mining claim mentioned and described in said complaint.

Denies that the plaintiff has been, or was at the time of the commencement of this action, or is now, entitled to the ownership and possession of said premises by virtue of a compliance by itself and its grantors with the local laws, rules, and customs of miners in said California mining district and the statutes of the United States and of the State of Colorado concerning mineral lands, and denies that the plaintiff had been, or was, or now is, entitled to the ownership and possession of said premises in any other way or manner or by any other means whatsoever.

43 Denies that the plaintiff was at the commencement of this action, or is now, entitled to the possession of said Adelaide mining claim or any part thereof.

Denies that said claim is of great value and that it is of the value of five hundred thousand dollars.

Admits that the plaintiff is a citizen of the State of New York, and that this defendant is a corporation and citizen of the State of Missouri, and authorized by virtue of a compliance with the laws, rules, and regulations of the State of Colorado to do business in said State.

Denies that on, to wit, the 2d day of October or at any other time this defendant forcibly or unlawfully entered on said Adelaide Lode mining claim, or wrongfully or unlawfully ousted the plaintiff from the possession of the same or any part thereof, or wrongfully or unlawfully withheld, or thence, hitherto, or now unlawfully or wrongfully

withholds, the possession of said premises, or any part thereof, from the plaintiff, to the damage of the plaintiff in the sum of twenty-five thousand dollars or any other sum.

And this defendant, further answering, says that, by virtue of patents duly obtained from the Government of the United States, it is, and long prior to the 2d day of October, 1880, had been, the owner in fee of the two certain mining claims situated in said California mining district, which said claims so owned by this defendant are known as the Pine and Camp Bird Lode claims, and lie parallel and adjoining each other, and adjoining to said so-called Adelaide
44 Lode mining claim, and that long prior to the alleged entry by this defendant upon the said so-called Adelaide Lode mining claim this defendant and its grantors discovered a lode, ledge, or vein of mineral bearing silver and lead in rock in place in the said Pine and Camp Bird Lode claims, the top or apex of which was within the exterior lines of such lode claims, and that the general strike and course of such lodes and the apex thereof is a little north of east and south of west and across the said lode claims at an angle, and that defendant has for a long distance, to wit, the distance of over 500 feet, followed, explored, and exposed the top or apex of said lode within the boundaries of its claims aforesaid, and that the said lode has a dip or inclination to the east or easterly at right angles to its course and strike of about 14° from the horizon, and that defendant for a long time prior to the 2d day of October, 1880, to wit, since some time in the year 1877, had been engaged in following, developing, mining, and taking the ore from such vein, lode, or ledge, and had run numerous drifts, sunk numerous shafts, and made many and various openings upon said vein, lode, or ledge, and that throughout all such openings and explorations said lode, ledge, or vein was well defined, continuous, lying between an upper or hanging wall of porphyry and a lower or foot wall of quartzite, and carrying at all times and places large quantities of silver-bearing ore, and that in prosecuting its work on said lode, ledge, or vein and on the downward course thereof from its apex defendant mined and drove the said drift through the side line of said pretended Adelaide claim, if the same were carried down vertically at a great depth below the surface, to wit, at a depth of one hundred and fifty feet,
45 and continued said drift forward and into said claim.

And defendant avers that such shaft and other openings made by defendant were and are on the lode, ledge, or vein of this defendant, the top or apex of which was exposed within the surface lines of its property, and that it has throughout the entire distance followed continuously the same lode, ledge, or vein and not another and different one, and that the same is large, strong, and well defined, carrying at all times large quantities of silver-bearing ore, and that said lode in downward and onward course so far departs from a perpendicular that it cut and passed through the side line of the pretended Adelaide claim and into its territory aforesaid, and that the supposed entry of this defendant was by following said lode on its dip and not otherwise, and that at the time and for some time after this defendant had driven the said drift through the side line

of said Adelaide claim and into its territory neither plaintiff, its grantors, nor any one else had any workings or openings in that part of the Adelaide claim cut and entered by said drift as low down and at as great depth as the drift of this defendant and the workings (if any there were) of parties in possession of said Adelaide claim at a level considerably above the said drift.

And defendant says that the entry so made and possession so taken by defendant in mining and drifting as aforesaid are the same identical entry and possession complained of in said amended complaint and not other or different, and that the same were made and taken in pursuance of the lawful rights of this defendant as the owner of said Pine and Camp Bird Lode claims, and as to the owner and party lawfully entitled to the possession of said lode or vein
46 and of the ores within the same and beyond the surface lines of said Adelaine Lode mining claim vertically extended downward.

(S'g'd) G. B. REED & THATCHER & GAST,
Att'ys for Defendant.

Endorsed: 594. Terrible Mining Co. *vs.* Argentine Mining Co. Answer to amended complaint. Filed Nov. 6, 1883. (S'g'd) Edward F. Bishop, clerk. G. B. Reed & Thatcher & Gast, for def'ts.

And afterwards and on the same day, to wit, the 6th day of November, A. D. 1883, the same being one of the regular juridical days of the October term, A. D. 1883, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Second Trial Continued.

THE TERRIBLE MINING COMPANY
vs.
THE ARGENTINE MINING COMPANY.

For possession of specific real property, &c.

At this day come again the said parties, by their attorneys respectively, and the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.
47 And the said jurors being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

And afterwards and on, to wit, the 7th day of November, A. D. 1883, the same being one of the regular juridical days of the October term, A. D. 1883, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Second Trial Continued.

THE TERRIBLE MINING COMPANY

vs.

THE ARGENTINE MINING COMPANY.

For possession of specific real property, &c.

At this day come again the said parties, by their attorneys respectively, and the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

48 And afterwards and on, to wit, the 8th day of November, A. D. 1883, the same being one of the regular juridical days of the October term, A. D. 1883, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Second Trial. Verdict for Plaintiff.

THE TERRIBLE MINING COMPANY

vs.

THE ARGENTINE MINING COMPANY.

For possession of specific real property, &c.

At this day come again the said parties, by their attorneys respective[ly], and the said jurors being now all here present and in the jury-box the trial herein is resumed.

And the said jurors, having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

And afterwards and on this same day come again the said jurors and on their oaths do say they find the issues herein for the plaintiff, and that it is entitled to the possession of the premises described in the complaint and in controversy in this cause.

And afterwards and on the same day, to wit, the 8th day of November, A. D. 1883, came again the said defendant, by its attorneys aforesaid, and filed in said court and in said cause its motion for a new trial of the issues herein joined, and the said motion is in words and figures as follows, to wit:

49 *Motion for New Trial.*

In the Circuit Court of the United States for the District of Colorado.

THE TERRIBLE MINING COMPANY, Pl'ff,

vs.

THE ARGENTINE MINING COMPANY, Def't.

And now comes the defendant in the above-entitled action, by G. B. Reed and Thatcher & Gast, its attorneys, and moves the court to set aside the verdict herein and for a new trial for the reasons following:

First. The verdict of the jury is unsupported by the evidence.

Second. The verdict of the jury is unsupported by the law of the case.

Third. The verdict of the jury is contrary to the instructions of the court.

Fourth. The court erred in admitting the title papers of the plaintiff, it not having been alleged in the complaint that it claimed its title by purchase.

Fifth. The verdict is not in the form prescribed & required by statute.

(S'g'd) G. B. REED,
THATCHER & GAST,
Att'ys for Def't.

Endorsed: 594. The Terrible Mining Company *vs.* The Argentine Mining Company. Motion for a new trial. Filed Nov. 8, 1883. (S'g'd) Edward F. Bishop, clerk. G. B. Reed, Thatcher & Gast, att'ys for def't.

50 And afterwards and on, to wit, the 9th day of November, A. D. 1883, the same being one of the regular juridical days of the October term, A. D. 1883, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order Fixing Time to File Bill of Exceptions.

THE TERRIBLE MINING COMPANY

vs.

THE ARGENTINE MINING COMPANY.

For possession of specific real property, &c.

At this day comes the said plaintiff, by T. M. Patterson, Esq., its attorney, and the said defendant, by H. C. Thatcher, Esq., its attorney, also comes.

And thereupon, on motion of the said defendant, it is ordered by the court that the said defendant be allowed thirty (30) days from the entry of judgment herein within which time to file herein its bill of the exceptions reserved by it upon the trial herein.

And afterwards and on, to wit, the 2d day of January, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1883, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Motion for New Trial Denied. Judgment on Verdict. Supersedeas Bond, $1,000.00.

51 THE TERRIBLE MINING COMPANY
vs.
THE ARGENTINE MINING COMPANY.

For possession of specific real property and for damages.

At this day comes the said plaintiff, by C. S. Thomas, Esq., its attorney, and the said defendant, by H. C. Thatcher, Esq., its attorney, also comes.

And the motion of the said defendant for a new trial of the issues herein joined coming on now to be heard is submitted to the court, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore, on motion of the said plaintiff, it is ordered by the court that judgment be entered herein in favor of the said plaintiff and against the said defendant, upon the verdict of the jury, for the possession of the real property in the said complaint herein mentioned, and the said plaintiff's costs to be taxed.

And let the supersedeas bond herein be in the sum of one thousand dollars ($1,000.00), and let execution herein be stayed for thirty (30) days from this day.

And thereupon, and on the same day, to wit, the 2d day of January, A. D. 1884, judgment was duly entered against the said defendant in the judgment-book of said court, in pursuance of the statutes and rules of court, and the said judgment is in words and figures as follows, to wit:

Judgment for Plaintiff.

52 THE TERRIBLE MINING COMPANY
vs.
THE ARGENTINE MINING COMPANY.

Action for possession of specific real property and for damages.

On this 2d day of January, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1883, of said court, there being present the Honorable Moses Hallett, district judge, it is considered by the court that the said plaintiff do have and recover of and from the said defendant possession of the property, lands, and tenements in said amended complaint described, to wit: The Adelaide Lode mining claim, situate in California mining district, county of Lake, and State of Colorado, known and described as follows: Beginning at corner No. 1, a pine post, being northwest

corner of same, from which discovery post and shaft bears S. 14° 45′ E. 201 feet (variation in all courses 15° E.), and U. S. locating monument No. 11, established April 25th, 1877, by Charles W. Milburn and W. H. Bradt, U. S. deputy mineral surveyors, bears S. 18° 21′ W. 1,556 feet, and the said monument No. 11 bears N. 25° 47′ E. 1,703.9 feet from corner No. 5, survey No. 232; thence S. 23° 30′ W. 750 to stake 1,500 ft. to corner No. 2; thence S. 51° E. 300 ft. to corner No. 3; thence N. 33° 30′ E. 750 ft. to stake 1,500 ft. to corner No. 4; thence N. 51° W. 300 feet to place of beginning, and that it have a writ of possession therefor.

It is further considered by the court that the said plaintiff do have and recover of and from the said defendant its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 7th day of January, A.
53 D. 1884, came again the said defendant, by its attorneys aforesaid, and filed in said court and in said cause its bill of the exceptions reserved by it upon the trial of the issues herein, and the bill of exceptions is in words and figures as follows, to wit:

Defendant's Bill of Exceptions.

54 UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the United States in and for said District.

THE TERRIBLE MINING COMPANY, Plaintiff,

vs.

THE ARGENTINE MINING COMPANY, Defendant.

Be it remembered that on the trial of this cause at the October term, A. D. 1883, of the said circuit court (the plaintiff appearing by Thomas M. Patterson and Charles S. Thomas, attorneys of said court, and defendant appearing by G. R. Reed and H. C. Thatcher, attorneys of said court), the plaintiff then and there, to maintain the issues on its part, gave in evidence to the jury the testimony following:

55 FRED. C. BUCKLEY was then called, sworn, and examined in behalf of the plaintiff, and testified, *inter alia*, as follows:

I reside in Leadville, Colorado, and have resided there for nearly five years; by profession I have been a civil and mining engineer since 1871. I am acquainted with the Ad-laide mining claim, and am familiar with its boundaries. In the spring of 1879 I first saw the north end stakes of the Ad-laide claim; since that time I have seen all the boundary stakes.

JOHN HURLBURT was then called, sworn, and examined as a witness in behalf of the plaintiff, and testified, *inter alia*, as follows:

I reside at Manitou Springs, El Paso county, in this State; have

lived in Colorado since 1876; am acquainted with the Ad-laide
56 Lode mining claim; have known it since 1877 or 1878; I think it was 1878. I was one of the owners of that claim. About six weeks before making the purchase I made an examination of the workings therein. I knew Mr. Walls and Mr. Powell, the locators of that claim; was shown by them what they called the discovery shaft. This, I think, was in June, July, or August; it may have been in 1877. Before I purchased I found the discovery shaft on the Ad-laide claim. Near the shaft there was a stake with the names of two locators; one was Mr. Walls and the other was Mr. Powell, and it gave the direction in which they had taken their claim, and gave the width and the length of it and the name of the claim. The letter "e" was omitted in the name Adelaide. Before purchasing I examined the surface boundaries of the claim. I saw the stakes were all there. I saw the claim measured before I
57 bought it. I saw the end stakes and the side stakes of the old claim. There were six stakes, besides the discovery stake, making seven in all.

PROSPER J. GOVES was then called, sworn, and examined as a witness in behalf of the plaintiff, and testified, *inter alia*, as follows:

I live in Oro City, Colorado; have lived there 13 years or over. I knew Walls and Powell. Walls and Powell moved away some time in the fall of 1877 or spring of 1878. I know the claim called the Ad-laide, located by Walls and Powell. I have known that claim ever since 1876. I have seen Walls and Powell working on that claim in 1876. I saw a discovery stake on that claim, which, I believe, was set up near the shaft where Walls and Powell were working. I do not remember what was written upon the dis-
58 covery stake. I am quite positive the discovery stake was on the Ad-laide claim. It was close to the shaft on the upper side; I believe above it.

JOHN J. DEVLIN was then called, sworn, and examined in behalf of the plaintiff, and testified, *inter alia*, as follows:

I reside in Oro City, Colorado; have lived there between 5 and 6 years. I have been mining and am now in the saloon business. I have been mining most of the time. I know Frank Walls and Mr. Powell. I knew them about two years. I think Walls is in New Mexico and Powell in South Carolina. I know the Ad-laide claim in Stray Horse gulch; have known it since March, 1877. I was on that claim in March, 1877. Walls and Powell were working on it at that time; they were working on the lower end of the claim,
59 near Stray Horse gulch; they were sinking a shaft somewhere in that vicinity, not a great distance from the line of the gulch. That shaft was between 20 and 30 feet deep; there was a windlass upon it. I think Powell was at the time in the bottom of the shaft; they were taking out iron and mineral; this was in March, 1877. The shaft was round, with a square collar where the windlass was set on. I have been in some of the tunnels and drifts near where the old smelter stood on the Ad-laide claim. I noticed

a stake at the shaft. I do not recollect what the stake had on it. There was a stake there, but I cannot say whether at the discovery shaft.

60 Plaintiff now offers in evidence the original location certificate of the Ad-laide mining claim, which certificate is signed by A. B. Powell and Frank Walls and certified by J. W. Jacques, clerk and recorder of the county of Lake, State of Colorado, as being recorded in book 9, page 344, of the records of said county, and by which certificate the said Walls and Powell claim the right of location of said mining claim under date of August 2nd, 1876, which location certificate, with the endorcement thereon and the certificate of said clerk, is in words and figures following:

61 Book 9, page 344.

STATE OF COLORADO, } ss:
County of Lake, }

Know all men by these presents that we, the undersigned, have, this 2nd day of August, 1876, claimed, by right of location, fifteen hundred feet, lineon and horizontal measurement, in length and three hundred (300) feet in width on the "Ad-laide" lode along the vein thereof, with all its spurs, dips, variations, and angles, together with the amount of surface necessary for working the same and allowed by law, two hundred (200) feet of said lode so located lying and being north of the discovery shaft on said lode and thirteen hundred feet being south of said shaft, said lode being situated in Stray Horse gulch, California mining district, the location and bounds of said claim being marked and described more particularly as follows, to wit:

62 The discovery shaft being a little *being* below Stray Horse gulch, in or near said gulch, commencing at stake No. 1, at discovery, that running west 150 feet northerly to stake No. 2; thence easterly 300 feet to stake No. (3); thence southerly (750) feet to stake No. 4; thence southerly 750 feet to stake No. 5; thence westerly to stake No. 6 (300) feet; thence northerly 750 [feet] to stake No. 7; thence to the place of beginning.

We, the undersigned, being citizens of the United States, claim the above property in the county of Lake and State of Colorado.

A. B. POWELL.
FRANK WALLS.

Recorded September 6th, A. D. 1876, at 6 p. m.
JOSEPH H. WELLS, *Recorder.*

STATE OF COLORADO, } ss:
County of Lake, }

I, J. W. Jacque, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of loc. —, No. —, as appears of record in my office, in book 9, page 344, —.

Witness my hand and official seal this 3rd day of Nov., A. D. 1883.
[SEAL.] J. W. JACQUE,
Clerk and Recorder.
——— ———, *Deputy.*

63 The defendant, by its counsel, objected to the receiving in evidence of said original location certificate on the ground that no proper description of the said pretended claim was therein given; that no reference was therein made to — by natural object or permanent monument, as required by act of Congress in that behalf.

Whereupon, without ruling upon said objection, the plaintiff, by its counsel, offered in evidence its certain amended location certificate, purporting to have been recorded in book 9, page 478, of the records of Lake county aforesaid, which amended location is in words and figures following:

64 *Frank Walls et al. to Location Certificate, Ad-laide.*

Book 9, page 478.

Know all men by these presents that we, the undersigned, did on the nineteenth day of April, 1877, claim by right of relocation fifteen hundred feet, linear and horizontal measurement, in length and three hundred feet in width on the Ad-laide ledge or lode, along the vein thereof, with all its dips, variations, and angles, as allowed by law, one hundred and nineteen and four-tenths feet of said lode so located, lying and being N. 33° 30′ E. of the discovery post on said lode and 1,380.6 feet, being S. 33° 30′ W. of said post, said lode being situated in Lake county, Colorado State, in California mining district, the location and bounds of said claim being marked and described more particularly as follows, to wit: Beginning at cor. No. 1, a pine post, being N. W. cor. of same, from which discovery post and shaft bears S. 14° 45′ E. 201 feet; variation
65 in all courses 15° E., and U. S. locating monument No. 11, established April 25th, 1877, by Charles W. Milburn and W. H. Bradt, U. S. deputy mineral surveyors, bears S. 18° 21′ W. 1,556 feet, and the said monuments No. 11 bears N. 25° 47′ E. 1,703.9 feet from cor. No. 5, survey 232; thence S. 33° 30′ W. 750 feet to stake 1,500 feet to cor. No. 2; thence S. 51° E. 300 feet to cor. No. 3; thence N. 33° 30′ E. 750 feet to stake 1,500 feet to cor. No. 4; thence N. 51° W. 300 feet to beginning, being the same lode the former record of which is found in book 9, page 344, in office of clerk and recorder for the said county and State, this relocation being made to correct errors in courses and distances, and to correct with U. S. locating monuments by survey.

FRANK WALLS.
A. B. POWELL.

Recorded May 4th, A. D. 1877, at 4 p. m.

66 STATE OF COLORADO, } ss:
County of Lake, }

I, Jos. H. Wells, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that *that* the above and foregoing is a true and correct coppy of the certificate of the relocation of the Ad-laide lode, situated in California mining district, as appears of record in book 9, page 478, of Lake county records now in my office. Given under my hand and official seal this 13th day of July, A. D. 1878.

[SEAL.] JOS. H. WELLS,
Clerk & Recorder.

67 Thereupon the court ruled that the original certificate and amended certificate might be received together, as the alleged defect in the first certificate was corrected in the amended certificate.

To which ruling of the court in allowing the said original certificate to be so read in evidence in connection with the amended certificate the defendant, by its counsel, then and there excepted.

The plaintiff then offered in evidence a series of conveyances whereby all the right, title, and interest in and to the said Ad-laide claim owned and possessed by the said A. B. Powell and Frank Walls, locators aforesaid of said claim, was vested in the plaintiff in this action.

To the introduction of which conveyances in evidence the defendant, by its counsel, then and there objected on the sole ground that the plaintiff did not by its complaint, as by statute required,
68 allege title by purchase except inferentially; which objection was over-uled by the court, and said conveyances, and each and every of them, vesting the title to the said Ad-laide mining claim in the plaintiff in this suit were read in evidence; to which ruling of the court the defendant, by its counsel, then and there excepted.

So much of the foregoing testimony as relates to the boundary stakes and the discovery stake of the Ad-laide mining claim is all the evidence which was offered or received upon that subject.

The plaintiff also introduced evidence tending to prove that the location of the Ad-laide mining claim was made upon the top or apex of a vein or lode of rock in place bearing silver.

The plaintiff also introduced evidence tending to prove that the discoverers and locators sunk a shaft upon said vein to the depth of ten (10) feet or more from the lowest part of the rim at the
69 surface, and disclosed in the bottom of said shaft the lode or vein.

The plaintiff also introduced evidence tending to prove that the vein which was discovered, if any was there found, and upon which the location was made, is the same identical vein disclosed in all of the workings made, either by plaintiff or defendant, within the limits of the said Adelaide claim.

The plaintiff also introduced evidence tending to prove that the course of the top or apex of the lode discovered in the Ad-laide

claim is almost at right angles across said claim crossing the side lines thereof near the northeast end of said claim.

The plaintiff also introduced evidence tending to prove that the Ad-laide lode was discovered and the location of the claim was made before either the Pine, the Camp Bird, or other mining claims of the defendant were in existance.

Here the plaintiff rests.

70 *Defendant's Evidence.*

The said defendant, by its counsel, then and there offered and read in evidence on its part a patent from the United States to Patrick Gallagher and Charles Gallagher for the "Camp Bird lode," which said patent is in words, figures, and form following:

General Land Office, No. 3345. Mineral certificate No. 130.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and filed notes of survey of the claim of Patrick Gallagher and Charles Gallagher upon the Camp Bird lode, accompanied by the certificate of the register of the land office at Leadville, formerly Fairplay, in the State of Colorado, whereby it appears that in
71 pursuance of the said Revised Statutes of the United States Patrick Gallagher and Charles Gallagher did, on the nineteenth day of November, A. D. 1877, enter and pay for said mining claim or premises, being mineral entry No. 130 in the series of said office, designated by the surveyor general as lot No. 237, embracing a portion of the unsurveyed public domain in the California mining district in the county of Lake and State of Colorado, in the district of lands subject to sale at Leadville, formerly Fairplay, containing seven (7) acres and three hundred and five thousandths ($\frac{305}{1000}$) of an acre of land, more or less, and according to the returns on file in the General Land Office bounded, described, and platted as follows, with magnetic variation at fifteen (15) degrees east, to wit:

Beginning at corner No. 1, a quartz rock 16x10x8 inches in size, marked "1–237," from which a pine fourteen (14) inches in diameter bears north twenty-nine (29) degrees forty-eight (48) minutes east; at the distance of fourteen and five-tenths (14.5) feet a pine
72 twelve (12) inches in diameter bears south sixty (60) degrees west at the distance of twenty (20) feet, and U. S. locating monument No. XI bears south fifteen (15) degrees twenty-seven (27) minutes east at the distance of twelve hundred and fourteen (1214) feet; thence from said corner No. 1 north eighty (80) degrees east one hundred and fifty (150) feet to centre of discovery shaft, three hundred (300) feet to corner No. 2, a quartz rock 14x8x8 inches in size, marked "11–237;" thence south ten (10) degrees east four hundred and twenty-five (425) feet to northwesterly boundary

of Adelaide lode eight hundred and sixty-one and forty-five hundredths (861.45) feet to southeaster-y boundary of said Adelaide lode fifteen hundred (1,500) feet to corner No. 3, a porphyry rock, 20x10x3 inches in size, marked "111–237;" thence south eighty (80) degrees west three hundred (300) feet to cor. No. 4, a porphyry rock 16x6x4 inches in size, marked "IV–237," from which said locating monument No. XI bears north eleven (11) degrees forty-
73 six (46) minutes east at the distance of three hundred and thirteen and five-tenths (313.5) feet; thence from said corner No. 4 north ten (10) degrees west three hundred and sixty-four and five-tenths (364.5) feet to a point on southwesterly boundary of said Adelaide lode, from which the southeast corner of said Adelaide lode bears south fifty-one (51) degrees east at the distance of thirty-one and fifty-seven hundredths (31.57) feet, fifteen hundred (1,500) feet to the place of beginning, containing seven (7) acres and three hundred and five thousandths ($\frac{3}{1}\frac{0}{0}\frac{5}{0}$) of an acre of land, more or less, and embracing fifteen hundred (1,500) linear feet, southerly from discovery shaft on said Camp Bird lode, excepting and excluding, however, from these presents all that portion of the surface ground hereinbefore described which is embraced by said Adelaide lode, as represented by yellow shading in the following plat.

(Here follows diagram marked p. 73.)

74 Now know ye that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Patrick Gallagher and Charles Gallagher, and to their heirs and assigns, the said mining premises herein before described as lot No. 237, embracing a portion of the unsurveyed public domain, with the exclusive right of pos-session and enjoyment of all the land included within the exterior lines of said survey not herein expressed, excepted from these presents, and of fifteen hundred (1,500) linear feet of the said Camp Bird vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining and also of all other veins, lodes, ledges, or deposits throughout their entire depths the tops *at* apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically,
75 although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey, provided that the right of possession hereby granted to such outside parts of said veins, lodes, lodges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits, excepting and excluding, however, all that portion of said surface ground embraced by mineral survey No. 254 of the Adelaide mining claim, and also excepting and excluding all veins, lodes, ledges, or deposits the tops or apexes of which lie in-

side of the exterior lines of said Adelaide survey at the surface extended downward vertically, or which have been therein discovered or developed: Provided, That nothing contained in this grant
76 is intended to interfere with the legal rights of said claimants in case said veins are found on exploration to intersect with each other: And provided further, That nothing in this conveyance shall authorize the grantees herein, their heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another; to have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Patrick Gallagher and Charles Gallagher and to their heirs and assigns forever, subject nevertheless to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 237, with fifteen hundred (1,500) lineal feet of the Camp Bird vein, lode, ledge, or deposit for the length aforesaid throughout the entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depths as aforesaid the tops or apexes of which lie inside the exterior lines of said survey.

77 Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches, and reservoirs used in connections with such water rights as may be recog nized and acknowledged by the local laws, customs, and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress the Legislature of Colorado may provide rules for working
78 the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twentieth day of August, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth.

By the President: R. B. HAYES.

By WM. H. CROOK, *Secretary.*

W. R. IRWIN,

Recorder of the General Land Office ad Interim.

Recorded [in] vol. 41, pages 435 to 441, inclusive. Examined.

Which said patent is duly recorded in the office of the clerk and recorder of the county of Lake, in the State of Colorado, on the 11th day of September, A. D. 1879, in book 13, page 618, of the records of said county.

79 The defendant, by its counsel, then offered and read in evidence a patent from the United States to the "Pine lode," which patent is in words, figures, and form as follows:

General Land Office, No. 3500; mineral certificate No. 157.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and field-notes of survey of the claim of the Argentine Mining Company upon the Pine lode, accompanied by the certificate of the register of the land office at Fair Play, in the State of Colorado, whereby it appears that, in pursuance of the said Revised Statutes of the United States, the Argentine Mining Company did, on the twentieth

80 day of August, A. D. 1878, enter and pay for said mining claim or premises, being mineral entry No. 157 in the series of said office, designated by the surveyor general as lot No. 287, embracing a portion of the unsurveyed public domain in the California mining district, in the county of Lake and State of Colorado, in the district of lands subject to sale at Fair Play, now Leadville, containing four (4) acres and six hundredths (.06) of an acre of land, more or less, and, according to the returns of file in the General Land Office, bounded, described, and platted as follows, with magnetic variation at fifteen (15) degrees east, to wit:

Beginning at corner No. 1, a porphyry rock 14x7x3 inches in size, marked "1–287," from which discovery shaft on this claim bears south twenty (20) degrees forty-five (45) minutes east, at the distance of three hundred and five and six-tenths (305.6) feet, United States locating monument No. 11 bears south two (2) degrees twenty-

81 one (21) minutes east, at the distance of fourteen hundred (1,400) feet, corner No. 2 of survey No. 237, patented to Patrick Gallagher and Charles Gallagher, with their claim, upon the Camp Bird lode, bears south ten (10) degrees east, at the distance of one hundred and eighty-one (181) feet, a blazed pine ten (10) inches in diameter, marked "1–287," bears north forty-five (45) degrees east, at the distance of twelve and five-tenths (12.5) feet, and a blazed pine six (6) inches in diameter, marked "1–287," bears north sixty-one (61) degrees five (5) minutes west, at the distance of twenty-five and eight-tenths (25.8) feet; thence from said corner No. 1 south ten (10) degrees east one hundred and eighty-one (181) feet to corner No. 2 of said survey No. 237, being also corner No. 2 of survey No. 238, made for the claim of the Argentine Mining Company upon the Keystone lode, two hundred and nine and five-tenths (209.5) feet to corner No. 3 of said survey No. 238, six hundred

82 and six (606) fret to northwesterly boundary of the Adelalde

lode, seven hundred and fifty (750) feet to centre stake, one thousand and forty-two and four-tenths (1,042.4) feet to a point on southeasterly boundary of said Adelaide lode, from which the southeast corner of said Adelaide lode bears south thirty-three (33) degrees ten (10) minutes west, at the distance of four hundred and eight and three-tenths (408.3) feet, fifteen hundred (1,500) feet to corner No. 2, a porphyry rock 20x6x2 inches in size, marked "2–287," from which corner No. 2 of said survey No. 237 bears south ten (10) degrees east, at the distance of one hundred and eighty-one (181) feet, the same being corner No. 5 of Frenchmen lode, a blazed pine tree eleven (11) inches in diameter, marked "2–287," bears south twenty-eight (28) degrees forty-five (45) minutes east, at the distance of seven and one-tenth (7.1) feet and a blazed pine five (5) inches in diameter, marked "½–287," bear south eighty-four (84 degrees thirty (30) minutes east, at the distance of three and five-tenths (3.5) feet; thence from said corner No. 2 north eighty
83 (80) degrees east, two hundred and seven (207) feet to corner No. 3, a porphyry rock 13x9x2 inches in size, marked "3–287," from which a blazed pine ten (10) inches in diameter, marked "3–287," bears south seventy-one (71) degrees fifty-three (53) minutes east, at the distance of four and nine-tenths (4.9) feet, and a blazed pine ten (10) inches in diameter, marked "3–287," bears south eight (8) degrees fifteen (15) minutes west, at the distance of thirteen and eight-tenths (13.8) feet; thence from said corner No. 2 north ten (10) degrees west six hundred and seventy-eight and two-tenths (678.2) feet to southeasterly boundary of said Adelaide lode, the same being corner No. 7 of the Frenchmen lode, seven hundred and fifty *feet* (750) feet to centre stake, eleven hundred and fourteen and six-tenths (1,114.6) feet to northwesterly boundary of said Adelaide lode, twelve hundred and eighty-nine and seven-tenths (1,289.7) feet to corner No. 4 of said survey No. 238, fifteen hundred (1,500) feet to corner No. 4, a quartz rock 14x7x4 inches in size, marked "4–287," from which a blazed pine eleven
84 (11) inches in diameter, marked "4–287," bears south forty-seven (47) degrees east, at the distance of fourteen (14) feet, and a blazed pine ten (10) inches in diameter, marked "4–287," bears south fifty-two (52) degrees forty-eight (48) minutes west, at the distance of sixteen and three-tenths (16.3) feet; thence from said corner No. 4 south eighty (80) degrees west two hundred and seven (207) feet to the place of beginning, containing four (4) acres and six hundredths (.06) of an acre of land, more or less, and embracing fifteen hundred (1,500) linear feet of the Pine lode, to wit: Three hundred (300) linear feet northerly and twelve hundred (1,200) linear feet southerly from discovery shaft on said lode, as represented by yellow shading in the following plat:

(Here follows diagram marked p. 84.)

85 Now, know ye that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted,

and by these presents do give and grant unto the said Argentine Mining Company, and to its successors and assigns, the said mining premises hereinbefore described as lot No 287, embracing a portion of the unsurveyed public domain, with the exclusive right of pos-ession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred (1,500) linear feet of the said Pine vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depth the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey: Provided, That the right of pos-ession hereby granted to such outside deposits of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits, excepting and excluding, however, all that portion of said surface ground embraced by mineral surveys Nos. 238 and 254, and also excepting and excluding all veins, lodes, ledges, or deposits the tops or apexes of which lie inside the exterior lines of said surveys at the surface extended downward vertically or which have been therein discovered or developed: Provided, That nothing contained in this grant is intended to interfere with the legal rights of said claimants in case said veins are found on exploration to intersect with each other: And provided further, That nothing in this conveyance shall authorize the grantee herein, its successors or assigns, to enter upon the surface of a mining claim owned or possessed by another; to have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Argentine Mining Company and to its successors and assigns forever, subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 287, with fifteen hundred (1,500) linear feet of the Pine vein, lode, ledge, or deposit for the length aforesaid throughout its entire depth, as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depth, as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decissions of courts.

89 Fourth. That in the absence of necessary legislation by Congress the Legislature of Colorado may provide rules for working the mining claim or premises hereby granted involving easements, drainage, and other necessary means to its complete development.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the first day of November, in the year of our Lord one thousand eight hundred and ——, and of the Independence of the United States the one hundred and fourth.

By the President: (Signed) R. B. HAYES.
By WM. H. CROOK, *Secretary.*
S. W. CLARK,
Recorder of the General Land Office.

90 Recorded vol. 43, page 387 to 393, in'c, which said patent is duly recorded in the office of the clerk and recorder of the county of Lake, in the State of Colorado, on the 24th day of November, A. D. 1879, in book 24, page 57, of the records of said county.

The defendant, by its counsel, then offered and read in evidence on its part a patent from the United States to the "Keystone lode," which is in words, figures, and form as follows:

General Land Office, No. 3964; mineral certificate No. 195.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States

91 the plat and field notes of survey of the claim of the Argentine Mining Company upon the Keystone lode, accompanied by the certificate of the register of the land office at Fair Play, in the State of Colorado, whereby it appears that in pursuance of the said Revised Statutes of the United States the Argentine Mining Company did, on the first day of July, A. D. 1879, enter and pay for said mining claim or premises, being mineral entry No. 195 in the series of said office, designated by the surveyor general as lot No. 292, embracing a portion of the unsurveyed public domain in the California mining district, in the county of Lake and State of Colorado, in the district of lands subject to sale at Leadville, formerly Fair

Play, containing nine (9) acres and five hundredths ($\frac{5}{100}$) of an acre of land, more or less, and according to the returns of file in the General Land Office bounded, described, and platted as follows, with magnetic variation at fifteen (15) degrees east, to wit:

92 Beginning at corner No. 1, a quartz stone 16x10x7 inches in size, marked "1–292," the same being corner No. 1 of survey No. 237, patented to Patrick Gallagher with his claim upon the Camp Bird Lode; corner No. 1, of survey No. 238, and corner No. 1, of survey No. 284, patented to the Argentine Mining Company with its claim upon the Argentine lode, from which discovery shaft on this claim bears north twenty-four (24) degrees east at the distance of one hundred and sixty-four (164) feet; U. S. locating monument No. 11 bears south fifteen (15) degrees twenty-seven (27) minutes east at the distance of twelve hundred and fourteen (1,214) feet; a blazed pine fourteen (14) inches in diameter, marked "1–292," bears north twenty-nine (29) degrees forty-eight minutes east at the distance of fourteen and five-tenths (14.5) feet, and a blazed pine twelve (12) inches in diameter, marked "1–292," bears north sixty (60) degrees west at the distance of twenty (20) feet; thence from said

93 corner No. 1 north eighty (80) degrees east twenty-nine and five-tenths (29.5) feet to corner No. 2 of said survey No. 284, three hundred (300) feet to corner No. 2; a quartz stone 14x8x8 inches in size, marked "2–292," the same being corner No. 2 of said survey Nos. 237 and 238, from which a tunnel bears north sixty-one (61) degrees fifty (50) minutes west at the distance of one hundred and sixty-seven and five-tenths (167.5) feet; thence from said corner No. 2 south ten (10) degrees east twenty-eight and five-tenths (28.5) feet to corner No. 3; a quartz stone 14x8x6 inches in size, marked "3–292," the same being corner No. 3 of said survey No. 238; thence north eighty (80) degrees fifteen (15) minutes east two hundred and seven (207) feet to corner No. 4; a lime rock 13x8x3 inches in size, marked "4–292," from which a blazed pine ten (10) inches in diameter, marked "4–292," bears north sixteen (16) degrees west at the distance of eighteen and eight-tenths (18.8) feet, and a blazed pine

94 thirteen (13) inches in diameter, marked "4–292," bears north thirty-one (31) degrees forty-five (45) minutes east at the distance of fifteen and two-tenths (15.2) feet; thence from said corner No. 4 north ten (10) degrees west one hundred and eighty-one (181) feet to corner No. 4 of survey No. 287, patented to the Argentine Mining Company with its claim upon the Pine lode, two hundred and thirty-four and six-tenths (234.6) feet to corner No. 5, a porphyry rock 15x6x4 inches in size, marked "5–292;" thence north eighty-nine (89) degrees fifty-eight (58) minutes west two and eight-tenths (2.8) feet to corner No. 6 of survey No. 285, patented to the Argentine Mining Company, with its claim upon the Young America lode thirty and nine-tenths (30.9) feet to centre of road, three hundred and eighty-five and eight-tenths (385.8) feet to corner No. 6,

95 a quartz rock 17x12x6 inches in size, marked "6–292," the same being corner No. 1 of said survey No. 285 and corner No. 6 of said survey No. 238; thence north sixty-eight (68) degrees fifteen (15) minutes west one hundred and eight (108) feet to

a point on easterly boundary of said survey No. 284, from which corner No. 3 of said survey No. 284 bears north ten (10) degrees west at the distance of four and seven-tenths (4.7) feet one hundred and sixteen (116) feet to a point on northerly boundary of said survey No. 284, from which corner No. 3 of said survey No. 284 bears north eighty (80) degrees east at the distance of seven and one-tenth (7.1) feet, one thousand (1,000) feet to corner No. 7 of said survey No. 238, eleven hundred and seventeen (1,117) feet to corner No. 2 of said survey No. 285, eleven hundred and forty-nine and one-tenth (1,114.1) feet to corner No. 7, a granite rock 11x7x5 inches in size, marked "7–292;" thence south ten (10) degrees east three hun-
96 dred and fifty and seven-tenths (350.7) feet to corner No. 8, a quartz rock 13x8x4 inches in size, marked "8–92," the same being corner No. 8 of said survey No. 238; thence south sixty-eight (68) degrees fifteen (15) minutes east eight hundred and thirty-four and seven-tenths (834.7) feet to a point on westerly boundary of said survey No. 284, from which corner No. 4 of said survey No. 284 bears north ten (10) degrees west at the distance of two hundred and fifty and one-tenth (250.1) feet one thousand (1,000) feet to the place of beginning, containing nine (9) acres and five-hundredths ($\frac{5}{100}$) of an acre of land, more or less, and embracing fifteen hundred (1,500) linear feet of the Keystone lode, to wit, five hundred (500) linear feet easterly and one thousand (1,000) linear feet westerly from discovery shaft on said lode, as represented by yellow shading in following plat:

(Here follows diagram marked p. 96.)

97 Now, know ye that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Argentine Mining Company, and to its successors and assigns, the said mining premises hereinbefore described as lot No. 292, embracing a portion of the unsurveyed public domain, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey, not herein expressly excepted from thes- presents, and of fifteen hundred (1,500) linear feet of the said Keystone vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depths the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins,
98 lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey: Provided, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey, [and] at the surface so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits, excepting and excluding, however, from these

presents all that portion of the surface ground hereinbefore described which is embraced by said survey No. 284: And provided further, That nothing in this conveyance shall authorize the grantee herein, its successors or assigns, to enter upon the surface of a mining claim owned or possessed by another; to have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Argentine Mining Company, and to its successors and assigns, forever, subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 292, with fifteen hundred (1,500) linear feet of the Keystone vein, lode, ledge, or deposit for the length aforesaid throughout its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depths as aforesaid the tops or apexes of which lie inside the exterior lines of said survey.

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

Third That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, or decissions of courts.

Fourth. That in the absence of necessary legislation by Congress the Legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete developement.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twelfth day of May, in the year of our Lord one thousand eight hundred and eighty, and of the Independance of the United States the one hundred and fourth.

R. B. HAYES.

By the President:

By WM. H. CROOK, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office.

Recorded, vol. 49, page- 378 to 384, inclusive. Examined.

Which said patent is duly recorded in the office of the clerk and recorder of the county of Lake, in the State of Colorado, on the 9th

day of May, A. D. 1880, in book 49, page 1, of the records of said county.

The defendant, by its counsel, then offered and read in evidence on its part a patent from the United States of the "Charlestown lode," which patent is in words, figures, and form as follows:

102 General Land Office No. 3533; mineral certificate No. 164.

The United States of America to all whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and field notes of survey of the claim of the Argentine Mining Company upon the Charlestown lode, accompanied by the certificate of the register of the land office of Fair Play, in the State of Colorado, whereby it appears that in pursuance of the said Revised Statutes of the United States the Argentine Mining Company did on the fifth day of September, A. D. 1878, enter and pay for said mining claim or premises, being mineral entry No. 164 in the series of said office, designated by the surveyor general as lot No. 284, em-
103 bracing a portion of the unsurveyed public domain in the California mining district, in the county of Lake and State of Colorado, in the district of lands subject to sale at Leadville, formerly Fair Play, containing four (4) acres and thirty-one hundredths ($\frac{31}{100}$) of an acre of land, more or less, and according to the returns on file in the General Land Office, bounded, described, and platted as follows, with magnetic variation at fifteen (15) degrees east, to wit:

Beginning at corner No. 1, a quartz rock 16x10x8 inches in size, marked "1–284," "1–237," and "1–238," the same being corner No. 1 of survey patented to Patrick Gallagher *et al.* with their claim upon the Camp Bird lode, and corner No. 1 of survey No. 238, made for the Keystone lode, from which discovery shaft on this claim bears north four (4) degrees forty-one (41) minutes east at the distance of forty (40) feet; U. S. locating monument No. 11 bears south fifteen (15) degrees twenty-seven (27) minutes
104 east at the distance of twelve hundred and fourteen (1,214) feet; a blazed pine tree fourteen (14) inches in diameter, marked "1–284," bears north twenty-nine (29) degrees forty-eight (48) minutes east at the distance of fourteen and five-tenths (14.5) feet, and a blazed pine tree twelve (12) inches in diameter, marked "1–284," bears south sixty (60) degrees west at the distance of twenty feet; thence from said corner No. 1 north eighty (80) degrees east twenty-nine and five-tenths (29.5) feet to corner No. 2, a granite rock 12x8x3 inches in size, marked "2–284," from which a blazed pine tree nine (9) inches in diameter, marked "2–284," bears north thirty-three (33) degrees fifteen (15) minutes west at the distance of seven and one-tenth (7.1) feet, and a blazed pine tree two (2) feet in diameter, marked "2–284," bears south fifty-two (52) degrees thirty (30) minutes west at the distance of eleven and eight-tenths (11.8)

feet; thence from said corner No. 2 north ten (10) degrees
105 west one hundred and eighty-two (182) feet to centre of road, two hundred and forty-nine (249) feet to centre of road, three hundred and thirty-two and three-tenths (332.3) feet to a point on northerly boundary of said survey No. 238, from which corner No. 6 of said survey No. 238 bears south sixty-eight (68) degrees fifteen (15) minutes east at the distance of one hundred and eight (108) feet three hundred and thirty-seven (337) feet to corner No. 3, a porphyry rock 13x7x5 inches in size, marked "3–284," from which a blazed pine ten (10) inches in diameter, marked "3–284," bears north fifty-eight (58) degrees fifteen (15) minutes west at the distance of nine and seven-tenths (9.7) feet, and a blazed double pine twelve (12) inches in diameter, marked "3–284," bears south twenty-four (24) degrees fifteen (15) minutes east at the distance of nine (9) feet; thence from said corner No. 3 south eighty (80) degrees west seven and one-tenth (7.1)
106 feet to a point on northerly boundary of said survey No. 238, from which corner No. 6 of said survey No. 238 bears south sixty-eight (68) degrees fifteen (15) minutes east at the distance of one hundred and sixteen (116) feet, one hundred and seventy (170) feet to corner No. 4, a granite block 13x6x4 inches in size, marked "4–284," from which a blazed pine eleven (11) inches in diameter, marked "4–284," bears south fifty-one (51) degrees west at the distance of four and six-tents (4.6) feet, and a blazed pine twelve (12) inches in diameter marked "4-284" bears north fifty-eight (58) degrees fifty (50) minutes west at the distance of twenty-six and five-tenths (26.5) feet; thence from said corner No. 4 south ten (10) degrees east fifty-four (54) feet to centre of road two hundred and fifty and six-tenths (250.6) feet to a point on southerly boundary of said survey No. 238, from which corner No. 1 of said survey No.
107 238 bears south sixty-eight (68) degrees fifteen (15) minutes east at the distance of one hundred and sixty-five and three-tenths (165.3) feet, five hundred and twenty-one and six-tenths (521.6) feet to the northeast corner of the Belle of Colorado lode, the same being corner No. 1 of Devlin lode, seven hundred and fifty (750) feet to centre stake, twelve hundred and thirty-one and four-tenths (1,231.4) feet to northwesterly boundary of Adelaide lode, thirteen hundred and ten and nine-tenths (1,310.9) feet to southwesterly boundary of said Adelaide lode, fifteen hundred (1,500) feet to corner No. 5, a granite rock 18x7x3 inches in size, marked "5–284," from which a blazed pine six (6) inches in diameter, marked "5–284," bears north twelve (12) degrees forty-five (45) minutes west at the distance of eighteen and eight-tenths (18.8) feet, and a blazed pine nine (9) inches in diameter, marked "5–284," bears south forty-one (41) degrees west at a distance of twenty-one
108 and four-tenths (21.4) feet; thence from said corner No. 5 north eighty (80) degree east one hundred and forty and five-tenths (140.5) feet to corner No. 6, a granite rock 13x6x2 inches in size, marked "6–284," from which a blazed pine nine (9) inches in diameter, marked "6–284," bears south thirty-five (35) degrees twenty (20) minutes east at the distance of twelve and five tenths (12.5) feet; a blazed pine eight (8) inches in diameter, marked "6–284,"

day of May, A. D. 1880, in book 49, page 1, of the records of said county.

The defendant, by its counsel, then offered and read in evidence on its part a patent from the United States of the "Charlestown lode," which patent is in words, figures, and form as follows:

102 General Land Office No. 3533; mineral certificate No. 164.

The United States of America to all whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and field notes of survey of the claim of the Argentine Mining Company upon the Charlestown lode, accompanied by the certificate of the register of the land office of Fair Play, in the State of Colorado, whereby it appears that in pursuance of the said Revised Statutes of the United States the Argentine Mining Company did on the fifth day of September, A. D. 1878, enter and pay for said mining claim or premises, being mineral entry No. 164 in the series of said office, designated by the surveyor general as lot No. 284, em-
103 bracing a portion of the unsurveyed public domain in the California mining district, in the county of Lake and State of Colorado, in the district of lands subject to sale at Leadville, formerly Fair Play, containing four (4) acres and thirty-one hundredths ($\frac{31}{100}$) of an acre of land, more or less, and according to the returns on file in the General Land Office, bounded, described, and platted as follows, with magnetic variation at fifteen (15) degrees east, to wit:

Beginning at corner No. 1, a quartz rock 16x10x8 inches in size, marked "1–284," "1–237," and "1–238," the same being corner No. 1 of survey patented to Patrick Gallagher *et al.* with their claim upon the Camp Bird lode, and corner No. 1 of survey No. 238, made for the Keystone lode, from which discovery shaft on this claim bears north four (4) degrees forty-one (41) minutes east at the distance of forty (40) feet; U. S. locating monument No. 11 bears south fifteen (15) degrees twenty-seven (27) minutes
104 east at the distance of twelve hundred and fourteen (1,214) feet; a blazed pine tree fourteen (14) inches in diameter, marked "1–284," bears north twenty-nine (29) degrees forty-eight (48) minutes east at the distance of fourteen and five-tenths (14.5) feet, and a blazed pine tree twelve (12) inches in diameter, marked "1–284," bears south sixty (60) degrees west at the distance of twenty feet; thence from said corner No. 1 north eighty (80) degrees east twenty-nine and five-tenths (29.5) feet to corner No. 2, a granite rock 12x8x3 inches in size, marked "2–284," from which a blazed pine tree nine (9) inches in diameter, marked "2–284," bears north thirty-three (33) degrees fifteen (15) minutes west at the distance of seven and one-tenth (7.1) feet, and a blazed pine tree two (2) feet in diameter, marked "2–284," bears south fifty-two (52) degrees thirty (30) minutes west at the distance of eleven and eight-tenths (11.8)

feet; thence from said corner No. 2 north ten (10) degrees
105 west one hundred and eighty-two (182) feet to centre of road, two hundred and forty-nine (249) feet to centre of road, three hundred and thirty-two and three-tenths (332.3) feet to a point on northerly boundary of said survey No. 238, from which corner No. 6 of said survey No. 238 bears south sixty-eight (68) degrees fifteen (15) minutes east at the distance of one hundred and eight (108) feet three hundred and thirty-seven (337) feet to corner No. 3, a porphyry rock 13x7x5 inches in size, marked "3–284," from which a blazed pine ten (10) inches in diameter, marked "3–284," bears north fifty-eight (58) degrees fifteen (15) minutes west at the distance of nine and seven-tenths (9.7) feet, and a blazed double pine twelve (12) inches in diameter, marked "3–284," bears south twenty-four (24) degrees fifteen (15) minutes east at the distance of nine (9) feet; thence from said corner No. 3 south eighty (80) degrees west seven and one-tenth (7.1)
106 feet to a point on northerly boundary of said survey No. 238, from which corner No. 6 of said survey No. 238 bears south sixty-eight (68) degrees fifteen (15) minutes east at the distance of one hundred and sixteen (116) feet, one hundred and seventy (170) feet to corner No. 4, a granite block 13x6x4 inches in size, marked "4–284," from which a blazed pine eleven (11) inches in diameter, marked "4–284," bears south fifty-one (51) degrees west at the distance of four and six-tents (4.6) feet, and a blazed pine twelve (12) inches in diameter marked "4-284" bears north fifty-eight (58) degrees fifty (50) minutes west at the distance of twenty-six and five-tenths (26.5) feet; thence from said corner No. 4 south ten (10) degrees east fifty-four (54) feet to centre of road two hundred and fifty and six-tenths (250.6) feet to a point on southerly boundary of said survey No. 238, from which corner No. 1 of said survey No.
107 238 bears south sixty-eight (68) degrees fifteen (15) minutes east at the distance of one hundred and sixty-five and three-tenths (165.3) feet, five hundred and twenty-one and six-tenths (521.6) feet to the northeast corner of the Belle of Colorado lode, the same being corner No. 1 of Devlin lode, seven hundred and fifty (750) feet to centre stake, twelve hundred and thirty-one and four-tenths (1,231.4) feet to northwesterly boundary of Adelaide lode, thirteen hundred and ten and nine-tenths (1,310.9) feet to southwesterly boundary of said Adelaide lode, fifteen hundred (1,500) feet to corner No. 5, a granite rock 18x7x3 inches in size, marked "5–284," from which a blazed pine six (6) inches in diameter, marked "5–284," bears north twelve (12) degrees forty-five (45) minutes west at the distance of eighteen and eight-tenths (18.8) feet, and a blazed pine nine (9) inches in diameter, marked "5–284," bears south forty-one (41) degrees west at a distance of twenty-one
108 and four-tenths (21.4) feet; thence from said corner No. 5 north eighty (80) degree east one hundred and forty and five-tenths (140.5) feet to corner No. 6, a granite rock 13x6x2 inches in size, marked "6–284," from which a blazed pine nine (9) inches in diameter, marked "6–284," bears south thirty-five (35) degrees twenty (20) minutes east at the distance of twelve and five tenths (12.5) feet; a blazed pine eight (8) inches in diameter, marked "6–284,"

bears north seventy (70) degrees east at the distance of five (5) feet, and corner No. 4 of said survey No. 237 bears south ten (10) degrees east at the distance of three hundred and thirty-seven (337) feet; thence from said corner No. 6 north ten (10) degrees west twenty-seven and five-tenths (27.5) feet to a point on southerly boundary of said Adelaide lode, from which the southeast corner of said Adelaide *load* bears south fifty-one (51) degrees east at the dis-
109 tance of thirty-one and five-tenths (31.5) feet, four hundred and eighteen and three-tenths (418.3) feet to a point on northwesterly boundary of said Adelaide lode, from which the sonthwest corner of said Adelaide lode bears south thirty-three (33) degrees ten (10) minutes west at the distance of two hundred and fifty-six and five-tenths (256.5) feet, seven hundred and fifty (750) feet to centre stake, eleven hundred and sixty-three (1,163) feet to the place of beginning, containing four (4) acres and thirty-one hundredth (.31) of an acre of land, more or less, and embracing fifteen hundred (1,500) linear feet of the Charlestown lode, to wit, three hundred (300) linear feet northwesterly and twelve hundred (1,200) linear feet southeasterly from discovery shaft on said lode, as represented by yellow shading in the following plat:

(Here follows diagram marked p. 109.)

110 Now know ye that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Argentine Mining Company, and to its successors and assigns, the said mining premises hereinbefore described as lot 284, embracing a portion of the unsurveyed public domain, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred (1,500) linear feet of the said Charlestown vein, lode, ledge, or deposit, for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining; and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface, extended downward vertically,
111 although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey:

Provided, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits, excepting and excluding, however, all that portion of said surface ground embraced by mineral survey No. 254 of the Adelaide mining claim; and also excepting and excluding all veins, lodes, ledges, and deposits the tops or apexes of which lie inside of the exterior

lines of said Adelaide survey at the surface, extended downward vertically, or which have been therein discovered or developed:

112 Provided, That nothing contained in this grant is intended to interfere with the legal rights of said claimants in case said veins are found on exploration to intersect with each other: And provided further, That nothing in this conveyance shall authorize the grantee herein, its successors or assigns, to enter upon the surface of a mining claim owned or possessed by another: To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Argentine Mining Company, and to its successors and assigns, forever, subject, nevertheless, to the following considerations and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 284, with fifteen hundred (1,500) linear feet of the Charlestown vein, load-, ledge, or deposits for the length aforesaid throughout its entire depth as aforesaid, together

113 with all other veins, lodes, ledges, or deposits throughout their entire depths as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

Second. That the premises hereby conveyed, with the exceptions of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit the top or apex of which lies outside the exterior limits of said survey should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

114 Fourth. That in the absence of necessary legislation by Congress the Legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of November, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independance of the United States the one hundred and fourth.

By the President: R. B. HAYES.

By WM. H. CROOK, *Secretary.*

S. W. CLARK,

Recorder of the General Land Office.

Recorded [in] vol. 44, pages 99 to 108, inclusive. Examined.

115 Which said patent is duly recorded in the office of the clerk and recorder of the county of Lake, in the State of Colorado, the 24th day of November, A. D. 1879, in book 24, page 49, of the records of said county.

The defendant then offered, introduced, and read in evidence a certain deed of conveyance from Patrick Gallagher and Charles Gallagher to August R. Meyer, bearing date the 28th day of January, A. D. 1878, whereby there was conveyed to the said August R. Meyer the "Camp Bird Lode mining claim," as particularly described in the said patent from the United States to the said Patrick Gallagher and Charles Gallagher.

The defendant then offered, introduced, and read in evidence a certain deed of conveyance from said August R. Meyer to Edwin Harrison, bearing date the 23rd day of March, A. D. 1878,
116 whereby there was conveyed to the said Edwin Harrison the "Camp Bird Lode mining claim," as particularly described in the said patent from the United States to said Patrick Gallagher and Charles Gallagher.

The defendant then offered, introduced, and read in evidence a deed of conveyance from the said Edwin Harrison to the Argentine Mining Company, the defendant in this action, bearing date the 5th day of April, A. D. 1879, whereby there was conveyed to the said The Argentine Mining Company the "Camp Bird Lode mining claim," as particularly described in the said patent from the United States to the said Patrick Gallagher and Charles Gallagher.

117 WILLIAM B. PAGE was then called, sworn, and examined as a witness on the part of the defendant, and testified *inter alia*, as follows:

I am a civil and mining engineer, and have been engaged in that capacity for 12 or 13 years; for the past five years I have resided in Leadville, and have there been extensively engaged in the examination of mines and the platting and mapping of them. A map is here shown witness, which, after identification, was offered and received in evidence and marked "Exhibit A." Concerning said map the witness testified: This map was made in my office by my partner and myself; it was prepared from actual survey on the ground, and is as correct as instrumental work can be. This is a plan map. It shows Stray Horse gulch running on the left-hand side thereof. The east is up Stray Horse gulch.
118 This map is made as though you approached from Leadville, the properties being on the right-hand side of the hill. On this map are represented the "Camp Bird," "Charlestown," "Pine," "Keystone," "Young America," "Terrible," and "Adelaide" lodes, with various underground and surface workings, and the top or apex of the lode or vein extending through the patented ground of the "Camp Bird" and "Pine" lodes, and other matters indicated on the face of the map. My partner and myself have also prepared another map which represents four sections of *the* this map, marked

"Exhibit B," —, after being identified by the witness, was offered and received in evidence. These four sections are marked *a b c*, *a e f c*, *d e f*, and *g h i*, and represented on one sheet are section maps showing four different sections or representations of the vein from the top or apex down in the direction of the dip; the amount of
119 dip is shown on these section maps. The red lines on the plan map are the horizontal projections of the sections. Both the plan map and the map showing the sections are lettered alike. By referring from the plan map to the section maps it will be seen to what part of the plan map the sections refer.

The witness now turns from the section map to the plan map and, concerning the same, testified as follows:

The boundary lines of these several claims, so far as they are delineated on the plan map, are the boundary lines as determined by actual survey. The top or apex referred to is indicated by a red line extending across the Pine and Camp Bird and in the direction of the Charlestown, the words "top or apex of vein" being written on, along, and close to said red line. By top or apex I mean the highest point of the lode comes to or nearest to the surface, and is in place—the foot wall in place, the
120 hanging wall in place, and the vein between. The apex, as shown on the map, is plainly discernible and indicated by stopings and workings near the northerly limit of the same. The outcrop of the vein is shown by the extreme northerly limits of the workings in the Pine and Camp Bird, and by the dark shading on the map just to the north of said apex. The stoping which has been done in the immediate vicinity of the outcrop is as shown by the dark shading. In connection with this drifts are run for the purpose of stoping. The workings are now caved in, but I was in and through a great many of them before that occur-ed. Ore in the stopes is 12 to 18 feet high, and the stoping was done across the "Pine" and "Camp Bird" lodes for more than half the length of the vein on the Camp Bird, and over 200 feet on the Pine, 400 or 500 feet altogether from this point to that.

121 (Here witness points to the extreme ends of the line indicated as the top or apex.)

The ore has a quartzite foot wall and porphyry hanging wall, and the dip of the vein, as near as may be determined, is in the direction of the Argentine tunnel marked on the map, which is south 20° east, about.

The witness here, for the purpose of explaining his last statement, placed his rule parallel to the said Argentine tunnel, S 20° E., first, at the eastern limit of the apex on the Pine lode, and the direction of the rule was such as to pass from said limit to and through the letter *f* on the plan and continuing in a straight line to the eastern side line of the Ad-laide claim; and, again, at the western limit of the apex as far as developed on the Camp Bird lode, the rule passing through the letter "e" of the word Ad-laide and continuing in a straight line to the eastern side line of the Ad-laide claim.

122 The witness continues:

This portion of the Ad-laide claim lying between the easterly and westerly lines just referred to is the portion covered by the dip of the lode, as far as can be determined by reference to the line of the apex as developed and indicated on the map.

The workings in the Argentine levels show no difference in coloring on the map; it only shows stoping from this point to that point.

(Here witness points from the extreme northerly limit of the workings to the easterly limit of the workings, as shown on the map.)

The dip is, as I said, S. 20° E. on an average; the angle of the dip is about 20° from the horizon.

The Argentine Mining Company has prosecuted its work in the direction of and on the dip, following the vein downward from its apex 500 or 600 feet to and beyond the easterly side line of the Pine lode, extending to a point marked *f* on the map, within the
123 side lines of the Ad-laide lode. (At the point marked *f* are written the words "wings and upraise.") The Argentine Company did between 2 or 3 miles of drifting in various directions before they finally intersected the work of the Ad-laide.

The Camp Bird discovery shaft is from 100 to 125 feet above the creek, in Stray Horse gulch. The Pine discovery shaft is about 100 feet above the creek in Stray Horse gulch. I have repeatedly been throug- a great many of the working — from the Pine and Camp Bird discoveries near the apex, following the workings in their entire course to the intersection with the work of the Ad-laide. I have gone into them for the purpose of examining them, and have seen the stopings and continuity of the vein from the outcrop down. The vein from the outcrop was unbroken and continuous into the Ad-laide, as determined by the stopes and levels and by all the actual devel-
124 opments. I can say without doubt the vein was continuous.

From the developments made and from the actual openings the line of the outcrop of the lode extending through the Pine and Camp Bird lodes and the line of the apex of said lode, as far as it has been explored, is over 500 feet. The ore body at certain points on the line of the apex came to the surface, as is shown by the stopings, to the southeast of which the vein is in rock in place, the top of the vein having but little soil over it. The northerly end line of the Pine claim is just as indicated on my map, and corresponds with the northerly end line as given in the patent. (Witness here reads the field-notes as given in the patent.) I check the discovery shaft and find the corners about as near here (witness points to corners indicated on map) as I can place them. The number of the Keystone survey as patented is 292. It was commenced at survey number 238. The north end line of the Pine is
125 further to the north than the north end line of the Camp Bird. The northerly end line of the Pine lode is as indicated on the map. The surface ground is excepted to this point. (Witness here points to a line which he indicates by his rule near the line B A D marked on said Pine lode.) This line which I now

point out is distant between 209 and 210 feet from the northerly end line of the Pine. The Keystone encludes the aforesaid surface ground. The angle of the dip of the vein in both the Camp Bird and Pine is about twenty degrees from the horizon. The strike of a vein is always at right angles to its dip. The outcrop varies from the strike, except on level ground. The line of the apex is indicated on the map as nearly at right angles to the side lines of the Pine and Camp Bird lodes. The ground along the apex, as indicated on the map, being nearly level the
126 directions of the apex and strike are nearly the same. The location of the Terribe lode is parallel to the Pine and Camp Bird. With reference to the outcrop of the vein, if developed, the Ad-laide is located with reference to that outcrop just as the Camp Bird and Pine are, but this is not with regard to the dip of the vein. The dip is in this direction (here witness points southeasterly), whereas the length of the Ad-laide extends southwesterly. The side lines of the Ad-laide with reference to the direction of the dip have an angle of about 45 or 50 degrees. I have shown the Camp Bird, Charlestown, and Pine lodes crossing the Ad-laide. According to the patent notes they do cross the Ad-laide. When we checked on these corners (witness here points to the northerly corners of the Camp Bird and Pine lodes) we found them to differ on the
127 ground from the patent notes by 5 or 6 feet only. The patent notes give the locations as represented on the map practically—I mean the outside lines. The surface area as applied for, as I have said before, I cannot tell you anything about without reference to the patents.

Franz Fohr was then called, sworn, and examined as a witness on the part of the defendant, and testified, *inter alia*, as follows:

I have lived in Leadville for the past three years, and have been engaged in the business of mining and smelting. I have had and still have charge of the Harrison Reduction Works. I am familiar with the locations of the Pine, Camp Bird, and Ad-laide claims and generally with the workings upon each of said claims. The
128 line of the apex of the vein or lode, so far as the same is shown by development, corresponds with the line indicated on the plan map by a red line and dotting on the northeasterly side of it. I can only trace on the ground from any examination which I have made the line of the top or apex as far as the same is indicated on the map.

Here the evidence closed.

The defendant then moved the court upon the evidence aforesaid to instruct the jury as follows:

1. One of the principal questions to be determined on the evidence relates to the location of the Ad-laide claim. It is claimed by the plaintiff that Walls and Powell, in the year 1876, located the Ad-laide mining claim under the statutes of this State and the
129 acts of Congress. It is necessary for the plaintiff to establish by a preponderance of evidence, first, that Walls and Powell

sunk a discovery shaft upon the lode or vein within the Ad-laide boundaries to the depth of at least ten feet, or deeper if necessary, to show a well-defined crevice; second, Walls and Powell, before having filed their location certificate, must have posted at the point of discovery on the surface a plain sign or notice containing the name of the lode, their own names as locators, and the date of the alleged discovery; third, they must have marked the surface boundaries of the claim by six substantial posts, hewed or marked on the side or sides, which are in toward the claim and sunk in the ground, to wit, one at each corner and one at the centre of each side line, and, fourth, before locating said Ad-laide claim they must have discovered a vein or lode of mineral in place within its limits. If the
130 plaintiff fails to prove by a preponderance of testimony compliance with either one of these statutory requirements, your verdict must be for the defendant.

2. The law provides that upon a location properly made the claimant shall have the vein upon which the location is made and all other veins and lodes having their top or apex in the territory within the lines of the location, and not only within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may in its descent into the earth pass beyond those lines and within the end lines of the location.

The defendant here claims that the lode in controversy originates in its patented territory by its top or apex and descends upon its dip through and under the ground in controversy. If from the
131 preponderance of evidence you believe that the top or apex of the lode in controversy does in fact originate within the patented territory of the defendant and descends upon its dip into the ground in controversy, your verdict should be for the defendant.

Which said instructions numbered 1 and 2, and each of them, so asked by the defendant the court refused to give to the jury; to which action and ruling of the court in refusing to give said instructions and each of them the defendant, by its counsel, then and there excepted.

Whereupon the court, upon its own motion, gave to the jury the following instructions:

In the Circuit Court of the United States.

TERRIBLE MINING COMPANY } No. 594.
vs.
ARGENTINE MINING COMPANY.

NOV. 8TH, 1883.

132 HALLETT, *J.*:

This case presents interesting questions of law, but as to its facts it is the ordinary question as to what is a valid location and like a great many that are tried in the courts of this State relating to the discovery of lodes and the location of claims upon them.

The statutes of the State, with which some of you, I suppose, are familiar, provides, in section five, that before filing a location cer-

tificate the discoverer shall locate his claim by sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such a shaft at the surface, or deeper, if necessary, to show a well-defined crevice; second, by posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery; third, by marking the surface boundaries of the claim; and then it

133 provides in what manner the boundaries shall be marked—by six substantial posts.

In this case it is not contended, and cannot be, that the defendant has any right by its location to the territory included within the Adelaide claim, except, perhaps, to the parts that may be traversed by the Pine, Camp Bird, and Charlestown locations, towards the southern end of it; and the ground that seems to be really in dispute between the parties is on the northerly side of the Pine location.

It is a rule of law that plaintiff, bringing his action to recover possession of a mining claim, must show a good location, in compliance with the statute in respect to locations. As interpreted here, that means that he shall show in his discovery shaft a vein or lode of valuable ore in rock in place.

The miner is not bound to make the first shaft or opening which he may sink his discovery shaft; he can make any one that he may sink his discovery shaft.

134 If, after sinking in one place and failing to find a lode, he sinks in another and does find one he can make his second shaft the discovery on which the location shall be based as well as the first—that is, it is competent for him to make any shaft which he may sink his discovery, but he must have in the discovery shaft a lode or vein; and the question at issue between the parties seems to be whether in this instance these parties did find a lode or vein in rock in place and in their discovery shaft, or what they denominated such. It is not sufficient for them to find minerals which could yield something in a fragmentary condition and in the slide or loose tuff on the surface of the mountain. They must find it within enclosing rocks in the general mass of the mountain. You understand that the float which shifts from place to place upon the surface of the mountain is not regarded by miners or by the courts as a lode or vein.

135 A lode or vein is something which stands within enclosing rocks in the general mass of the mountain.

Now, the question is here whether these parties who made this location, Walls and Powell, found such a lode or vein in what they denominate the discovery shaft or opening, whatever it was. The testimony seems to be very conflicting as to where it was located and what was found in it.

That is a matter of fact to be determined by you upon the evidence.

If you find that they made such discovery the next question is whether it extends to the point in dispute.

That also is controverted.

Much evidence has been put before you to show that the large deposits of ore which were found upon the side of the mountain there were the same or different from the ore that may or may not have been discovered near the gulch near where the mill was located.

136 A location is held to be valid only to the extent of the lode which is included within it. If a man extends his location beyond the limits of the lode, in so far as it goes beyond the lode it is held to be invalid, because he has no right to the surface, except in connection with his lode; that is the reason of the rule. Now, with reference to that, there is some evidence that if anything was found there—if there is a lode in that locality down next the gulch—that it is different from the one in which the large quantities of ore are found above; if so, it may extend through the property in dispute, in the same manner as the lode above extends throughout that territory. Mr. Fohr, one of the witnesses, gave an account of the condition of things there which was at all events intelligible, in saying that there were two bodies or strata of quartzite, one existing above the other; this large deposit was above the first body, while the other

137 one was below it—what he called the parting quartzite. I think perhaps there were some other witnesses who gave the same theory in respect to it. All of the witnesses have expressed some opinion about it, and the counsel on each side have argued the case with each one; if they were limited yesterday in their argument before you they have had plenty of argument with the witnesses on the stand as they came before you, so that all together you have had a pretty full argument upon the whole subject.

Now, gentlemen, that is about all that is to be said to you upon this matter.

The question turns upon the validity of this Adelaide location. As I have explained it to you, if you believe it to be a valid location, well made according to the law as given in the statutes, you will find for the plaintiff. If you think it was not so made you will find for the defendant.

138 The defendant, by its counsel, then and there excepted to the giving of certain parts of the foregoing charge or instructions, as hereinafter set forth.

First. The defendant then and there excepted to the following portion of said charge:

"The statute of the State, with which some of you I suppose are familiar, provides, in section five, that before filing a location certificate the discoverer shall locate his claim by sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show a well-defined crevice; second, by posting at the point of discovery on the surface a plain sign or notice containing the name of the lode, the name of the locator, and the date of the discovery; third, by marking the surface boundaries of the claim, and then it provides in what manner the boundaries shall be marked—by six substantial posts"—without a further instruction from the

139 court as to what the provision of the statute was, as to the manner in which the boundaries should be marked, to wit,

that they should be marked by six substantial posts hewed or marked on the side or sides which are in toward the claim, and sunk in the ground, to wit, one at each corner and one at the centre of each side line.

Second. The defendant then and there excepted to the following portion of said charge, to wit:

"In this case it is not contended and cannot be that the defendant has any right by its location to the territory included within the Ad-laide claim, except perhaps to the parts that may be traversed by the "Pine," "Camp Bird," and "Charlestown" location toward the southern end of it, and the ground that seems to be really in dispute between the parties is on the northerly side of the Pine location.

Third. The defendant then and there excepted to the fol-
140 lowing portion of said charge as given by the court, to wit:

"The question turns upon the validity of this Ad-laide location. As I have explained it to you, if you believe it to be a valid location, well made according to the law as given in the statute, you will find for the plaintiff." Without a further instruction from the court that if the jury believe from the evidence that the location of the Ad-laide claim was made upon the dip of a vein or lode whose top or apex was then in and extended through the patented territory of the defendant, such location of the Ad-laide claim would, to the extent that it was so on the dip of said vein whose top or apex was so in the defendant's patented territory, be invalid.

The foregoing instructions so given by the court upon its own motion were all the instructions given to the jury in said cause.

And thereupon the jury returned their verdict against the defendant.

Whereupon the defendant, by its counsel, filed the follow-
141 ing motion in writing to set aside the verdict and for a new trial.

In the Circuit Court of the United States for the District of Colorado

THE TERRIBLE MINING COMPANY, Pl't'ff,
vs.
THE ARGENTINE MINING COMPANY, Def'd't.

And now comes the defendant in the above-entitled action, by G. B. Reed & Thatcher & Gast, its —, and moves the court to set aside the verdict herein and for a new trial for the reasons following:

First. The verdict of the jury *as* unsupported by the evidence.

Second. The verdict of the jury is unsupported by the law of the case.

Third. The verdict of the jury is contrary to the instructions of the court.

Fourth. The court erred in admitting the title papers of the plaintiff, it not having been alleged in the complaint that it claimed its title by purchase.

142 Fifth. The verdict is not in the form prescribed & required by statutes.

G. B. REED &
THATCHER & GAST,
Att'ys for Def'd't.

But the court overruled the said motion; to which action and ruling of the court in denying said motion to set aside the verdict and for a new trial the defendant, by its counsel, then and there excepted, and thereupon the court gave judgment upon said verdict of the said jury; to which the defendant, by its counsel, then and there excepted.

And inasmuch as the matters aforesaid do not appear of record the defendant, by its counsel, presents this bill of exception, and prays that the same may be signed and sealed and made part of the record in said cause, and it is done accordingly.

(S'd) MOSES HALLETT, [SEAL.]
Dist. Judge.

143 [Endorsed:] 594. Circuit court. The Terrible Mining Co. *vs.* The Argentine Mining Co. Bill of exceptions. Filed Jan. 7th, 1884. (S'd) Edward F. Bishop, clerk. Thatcher & Gast, att'y-for defendant.

EXHIBITS A & B to bill of exceptions.

(Here follow diagrams marked pp. 144 & 145.)

146 And afterwards and on the same day, to wit, the 7th day of January, A. D. 1884, came again the said defendant, by its attorney aforesaid, and filed in said court and in said cause its bond, and sued out of said court a writ of error and citation to the Supreme Court of the United States, and the said bond is in words and figures as follows, to wit:

147 *Bond in Appeal or Error.*

United States Court, Colorado.

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that we, James R. Loker, Franz Fohr, and Charles T. Limberg, are held and firmly bound unto The Terrible Mining Company in the full and just sum of one thousand dollars, to be paid to the said The Terrible Mining Company; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this seventh day of January, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at the October term, A. D. 1883, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between The Terrible Mining Company, a cor-

poration plaintiff, and The Argentine Mining Company, a corporation defendant, judgment was rendered against the said defendant and in favor of said plaintiff for the recovery of certain real estate in the plaintiff's complaint described, and the defendant having obtained a writ of error to reverse the judgment of the said court, and a citation directed to the said plaintiff citing and admonishing it to be and appear at a term of the Supreme Court of the United States to be held at Washington, D. C., on the second Monday of October next:

Now the condition of the above obligation is such that if the said The Argentine Mining Company shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

(S'g'd) JAMES R. LOKER. [SEAL.]
(S'g'd) FRANZ FOHR. [SEAL.]
(S'g'd) CHAS. LIMBERG. [SEAL.]

Approved Jan. 7, 1884.
(S'g'd) MOSES HALLETT, *Judge.*

147½ *Justification.*

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

James R. Loker, Franz Fohr, and Charles T. Limberg, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in real and personal property the sum below set opposite his name—that is to say: As to James R. Loker, one thousand (1,000) dollars; as to Franz Fohr, one thousand (1,000) dollars; as to Charles T. Limberg, one thousand (1,000) dollars, over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

(S'g'd) JAMES R. LOKER. [SEAL.]
(S'g'd) FRANZ FOHR. [SEAL.]
(S'g'd) CHAS. LIMBERG. [SEAL.]

Subscribed and sworn to before me, at Leadville, this 5th day of January, A. D. 1884.

[Seal Dist. C't Lake Co., Colo.]

(S'g'd) J. H. PLAYLER,
Clerk of District Court of Lake County, Colorado.
By THOS. W. LEONARD,
Deputy Clerk.

Endorsed: Gen. No. 594. Circuit court of the United States, district of Colorado. The Terrible Mining Company, pl'ff, *vs.* The Argentine Mining Company, def't. Bond on writ of error by deft, $1,000.00. Filed this 7th day of Jan'y, A. D. 1884. (S'g'd) Edward F. Bishop, clerk, by —— ——, deputy clerk.

And the said writ of error is hereto attached, to wit:

148 *Writ of Error to Supreme Court U. S.*

THE UNITED STATES OF AMERICA, }
District of Colorado, } ss:

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court between the Terrible Mining Company and the Argentine Mining Company a manifest error hath happened, to the great damage of the said The Argentine Minining Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 7th day of January, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the 108th year.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk.*

Allowed by—
MOSES HALLETT,
District Judge.

149 [Endorsed:] Gen. No. 594. Supreme Court of the United States. The Argentine Mining Co., plaintiff in error, *vs.* The Terrible Mining Co. Writ of error to circuit court U. S., district of Colorado. Filed in —— court of the U. S. this —— day of ——, A. D. 18—. ——, clerk, by ——, deputy clerk. Thatcher & Gast, attorney- for plaintiff in error.

[In pencil:] 1, 16, '84. Sent copy by mail to C. S. Thomas.

Return.

THE UNITED STATES OF AMERICA, }
District of Colorado, } ss:

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly

certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 9th day of April, A. D. 1884.

EDWARD F. BISHOP, *Clerk*,
By —— ——, *Deputy Clerk*.

The plaintiff in error having served this writ of error, by lodging a copy thereof in the clerk's office, where the record remains, for the defendant in error within 60 days (Sundays exclusive) after rendering of the judgment herein, and having given the security required by law upon the issuing of the citation, this writ is therefore a supersedeas.

Attest: EDWARD F. BISHOP, *Clerk*.

And the said citation is hereto attached, to wit:

150 *Citation.*

U. S. Court.

UNITED STATES OF AMERICA, *District of Colorado*:

The United States of America to the Terrible Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, district of Colorado, wherein The Argentine Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 7th day of January, in the year of our Lord one thousand eight hundred and eighty-four.

MOSES HALLETT,
District Judge.

151 [Endorsed:] [In pencil:] (Original to file.) Gen. No. 594. Circuit court of the United States, district of Colorado. The Argentine Mining Co., plaintiff in error, *vs.* The Terrible Mining Co., defendant in error. Citation. Filed in circuit court of the U. S. this 8th day of Jan., A. D. 1884. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Thatcher & Gast, attorneys for plaintiff in error.

We hereby accept service of the within citation, and acknowledge the delivery of a copy thereof to us by The Argentine Mining Company.

Denver, Col., January 8th, A. D. 1884.

T. M. PATTERSON,
C. S. THOMAS,
Att'ys for Terrible Mining Company.

152 And afterwards and on, to wit, the 8th day of January, A. D. 1884, came H. C. Thatcher, Esq., one of the attorneys of record for said defendant in said cause, and filed in said court and in said cause his affidavit as to the value of the property in controversy herein; and the said affidavit is in words and figures as follows, to wit:

Affidavit as to Value.

In the Circuit Court of the United States for the District of Colorado

THE TERRIBLE MINING COMPANY, Plaintiff,

vs.

THE ARGENTINE MINING COMPANY, Defendant.

Affidavit of value.

H. C. Thatcher, being duly sworn, on oath states that he is one of the attorneys of record of the Argentine Mining Company, defendant herein; that as such attorney he is acquainted with the premises in controversy in this action; that the matter in dispute herein, exclusive of costs, exceeds the sum and value of five thousand dollars.

(S'g'd) H. C. THATCHER.

Subscribed and sworn to before me this 8th day of January, A. D. 1884.

[Seal Dist. C't U. S., Colo.]

(S'g'd) EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk.*

Endorsed: 594. Circuit court U. S. The Terrible Mining Co. *vs.* The Argentine Min'g Co. Affidavit of value by H. C. Thatcher. Filed Jan. 8, 1884. (S'g'd) Edward F. Bishop, clerk.

153 UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or had and entered of record in said court and in a certain cause lately in said court pending, wherein The Terrible Mining Company was plaintiff and The Argentine Mining Company defendant, as

fully and completely as the same still remains of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 9th day of April, A. D. 1884.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Cost of Transcript.

304 folios @ 10c.	30 40
4 maps @ 2.00	8 00
Certificate	35
	$38 75 paid by Argentine Min'g Co.

Endorsed on cover: Colorado C. C. U. S. No. 250. The Argentine Mining Company, plaintiff in error, *vs.* The Terrible Mining Company. Filed 19th May, 1884.

122-478

APR 12 1887

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE ARGENTINE MINING COMPANY,
Plaintiff in Error,
vs.
THE TERRIBLE MINING COMPANY,
Defendant in Error.
} *No. 250*

BRIEF FOR PLAINTIFF IN ERROR.

A. T. BRITTON,
A. B. BROWNE,
W. H. SMITH,
Attys. for Plff. in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1887.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE ARGENTINE MINING COMPANY,
PLAINTIFF IN ERROR,
v.
THE TERRIBLE MINING COMPANY.

No. 250.

In Error to the Circuit Court of the United States for the District of Colorado.

THE CASE.

The Terrible Mining Company, defendant in error, brought its suit against the Argentine Mining Company, plaintiff in error, in the Circuit Court of the United States for the District of Colorado on the 11th of October, 1880.

In its second amended complaint, which is the one on which the plaintiff went to trial, it alleged that the plaintiff was a corporation and citizen of the State of New York, and that the defendant was a corporation and citizen of Missouri; that the plaintiff was the owner of the Adelaide Lode, a mining claim situate in the California Mining District, in the county of Lake, and State of Colorado, and was entitled to the possession of the same; that the defendant had forcibly and unlawfully entered on said Ade-

laide Lode, and wrongfully ousted the plaintiff from the possession thereof, and wrongfully withheld the same.

It asked for a judgment for the recovery of possession and for damages and costs (Record, p. 21).

The answer of the defendant denied that the plaintiff was the owner of the Adelaide Lode, and all the other allegations of the complaint, except those relating to citizenship.

It set up, by way of an independent defence, that it was the owner of two mining claims in the said California mining district known as the Pine and the Camp Bird Lode claims, and had received a patent from the United States therefor; that these lodes lay parallel to and adjoining each other and adjoining to and across the said Adelaide Lode; that it and its grantors had discovered, in said Pine and Camp Bird claims, a mineral bearing lode, ledge, or vein of silver, the top or apex of which was within the exterior lines of their said Pine and Camp Bird Lode claims; that it had followed and mined said vein in its downward course outside of its side lines and within planes drawn vertically downwards through its end lines, until it entered into and under the said Adelaide Lode at about one hundred and fifty feet below the surface; that this was the entry set forth in the complaint; and that the plaintiff had no workings or openings in that part of the Adelaide claim cut and entered by the defendant (Record, p. 23).

There was no replication to this answer, although there was one to a former answer substantially like this (Record, p. 9).

There was a trial and verdict for plaintiff; a motion for a new trial, which was overruled, and judgment entered for plaintiff on the verdict. A bill of exceptions was taken embodying the evidence.

From this bill of exceptions it appears that the plaintiff

gave evidence tending to support its claim and the defendant gave evidence tending to make good its defence (Record, p. 50).

It appeared from the evidence that the Adelaide Lode claim was located before either the Pine or Camp Bird Lode claims.

After the evidence was closed on both sides the counsel for the defendant moved the court to instruct the jury as follows:

"2. The law provides that upon a location properly "made the claimant shall have the vein upon which the "location is made and all other veins and lodes having "their top or apex in the territory within the lines of the "location, and not only within the body of the claim "within the lines of the location, but beyond those lines "as far as the vein or lode may, in its descent into the "earth, pass beyond those lines and within the end lines "of the location.

"The defendant here claims that the lode in controversy "originates in its patented territory, by its top or apex, "and descends upon its dip through and under the ground "in controversy. If, from the preponderance of evidence, "you believe that the top or apex of the lode in contro- "versy does, in fact, originate within the patented terri- "tory of the defendant and descends upon its dip into the "ground in controversy, your verdict should be for the "defendant."

This instruction the court refused to give and the defendant excepted (Record, pp. 51, 52).

After this refusal the court charged the jury, and among other things said: "The question turns upon the validity "of this Adelaide location. As I have explained to you, "if you believe it to be a valid location, well made, accord- "ing to the law as given in the statutes, you will find "for the plaintiff" (Record, p. 54.)

To this part of the charge the defendant excepted as follows:

"Third. The defendant then and there excepted to the following portion of said charge as given by the court, "to wit: 'The question turns upon the validity of this "'Adelaide location. As I have explained it to you, if you "'believe it to be a valid location, well made according to "'the law as given in the statute, you will find for the "'plaintiff.' Without a further instruction from the court "that if the jury believe from the evidence that the loca- "tion of the Adelaide claim was made upon the dip of a "vein or lode whose top or apex was then in and extended "through the patented territory of the defendant, such "location of the Adelaide claim would, to the extent that "it was on the dip of said vein whose top or apex was so "in defendant's patented territory, be invalid."

ASSIGNMENT OF ERRORS.

1. *The court erred in refusing to give instruction No. 2, as requested.*

2. *The court erred in charging the jury as stated in the third exception.*

ARGUMENT.

This writ of error is prosecuted for the sole purpose of determining the right of a mineral claimant who has the apex within his surface lines extended vertically downward to follow his vein outside of his own side lines, and into and under another mineral claim which has a prior location upon the dip of the lode, but which does not embrace the apex.

Sec. 2322 of the Revised Statutes gives the right under which the plaintiff claims, and is as follows:

"SEC. 2322. The locators of all mining locations here- "tofore made, or which shall hereafter be made on any

" mineral vein, lode, or ledge, situated on the public do-
" main, their heirs and assigns, where no adverse claim
" exists on the tenth day of May, eighteen hundred and
" seventy-two, so long as they comply with the laws of
" the United States, and with State, Territorial, and local
" regulations not in conflict with the laws of the United
" States governing their possessory title, shall have *the ex-*
" *clusive right of possession and enjoyment of all the surface*
" *included within the lines of their locations, and of all*
" *veins, lodes, and ledges throughout their entire depth, the*
" *the top or apex of which lies inside of such surface lines*
" *extended downward vertically, although such veins, lodes,*
" *or ledges may so far depart from a perpendicular in their*
" *course downward as to extend outside the vertical side*
" *lines of such surface locations.*

" But their right of possession to such outside parts of
" such veins or ledges shall be confined to such portions
" thereof as lie between vertical planes drawn downward,
" as above described, through the end lines of their loca-
" tions, so continued in their own direction that such
" planes will intersect such exterior parts of such veins or
" ledges. And nothing in this section shall authorize the
" locator or possessor of a vein or lode which extends in
" its downward course beyond the vertical lines of his
" claim to enter upon the surface of a claim owned or
" possessed by another."

The language of this section is so plain that it seems to us to settle the question.

The premises in controversy were outside of the side lines and within vertical planes drawn through the end lines of the Pine and Camp Bird Lodes and just within the side line of the Adelaide.

This is made clear by the testimony of the witness William B. Page (Record, pp. 48, 51), and the large map referred to by him and made a part of the record. See place marked "f" and "winzes" and "uprise" on the map.

Now it was in reference to these workings and these premises at this point that the court was asked to charge that if they found the apex of this vein within the surface lines of the Argentine claim (which included the Pine and Camp Bird claims) their verdict should be for the defendant.

The court not only refused so to charge, but it *utterly ignored all claim of the defendant on this ground*, and held that it had nothing to do with the case, but that it turned wholly upon the validity of the Adelaide location. The defendant had made, as one of his grounds of defence, the invalidity and irregularity of the Adelaide location.

This was error. The statute has always been construed by the Department as we claim it should be construed. The form of patent in use expressly grants "all other veins, "lodes, ledges, or deposits, throughout their entire depths, "the top or apexes of which lie inside the exterior lines "of said survey at the surface extended downward verti- "cally, although such veins, lodes, ledges, or deposits, in "their downward course, may so far depart from a perpen- "dicular as to extend outside the vertical side lines of said "survey;" and excepts from its operation "all veins, lodes, "ledges, or deposits, the tops or apexes of which lie inside the "exterior lines of said survey at the surface extended down- "ward vertically, or which have been therein discovered "or developed;" and further provides, "that the premises "hereby conveyed, with the exception of the surface, may "be entered by the proprietor of any other vein, lode, "ledge, or deposit, the top or apex of which lies outside the "exterior limits of said survey should the same, in its down- "ward course, be found to penetrate, intersect, extend into, "or underlie the premises hereby granted for the purpose "of extracting and removing the ore from such other vein, "lode, ledge, or deposit."

All these provisions are found in the patent for the Camp Bird Lode (Record, pp. 35, 36) and that of the Pine Lode (Record, p. 39), and they will be contained in the patent for the Adelaide when it shall be issued.

If they were not contained in the patent, its legal effect would be the same.

The fact that the defendant in error made the first location cannot affect the question now presented. The statute must control. (Mining Company *v.* Tarbet, ~~92~~ U. S., ~~470~~; Iron Silver Mining Company *v.* Elgin Co., 118, U. S., 196.) It gives to the locator who has the apex the right to the lode. A locator who makes a location which does not contain the apex, takes his chances of some other locator who does have the apex, taking from him such portion of his lode as lies within the end lines of the apex claimant. 98 U.S. 463

This precise question has never been determined by this court; but in the case of Iron Silver Mining Co. *v.* Cheesman (116 U. S., 529) it was conceded by all parties and the court that the party having the apex had the right to go outside of his side lines and follow the vein. Mr. Justice Miller, in delivering the opinion of the court, said: "It is obvious that the vein, lode, or ledge of which the "locator may have 'the exclusive right of possession and "'enjoyment,' is one whose apex is found inside of his "surface lines extended vertically; and this right follows "such vein, though in extending downward it may depart "from a perpendicular, and extend laterally outside of the "vertical lines of such survey."

And in Iron Silver Mining Co. *v.* Elgin Mining Co. *supra*, Mr. Justice Field in delivering the opinion of the court said: "This section" (refer to sec. 2322 Rev Stat.) "appears sufficiently clear upon its face. There is no patent or latent ambiguity in it. "They" (the locators) "have also the "exclusive right of possession and enjoyment 'of all veins,

" ' lodes and ledges throughout there entire depth, the top
" ' or apex of which lies inside of such surface lines extended
" ' downward vertically, although such veins, lodes, or
" ' ledges, may so far depart from a perpendicular in their
" ' course downward, as to extend outside the vertical side
" ' lines of said surface location.' The surface side lines ex-
" tended downward vertically determine the extent of the
" claim, except when in its descent the vein passes outside
" of them, and the outside portions are to lie between
" vertical planes drawn downward through the end
" lines. This means the end lines of the surface location,
" for all locations are measured on the surface."

We are unable to understand why it was the court below ruled as it did, and believing, as we do, that it was in error, we ask that its judgment may be reversed.

A. T. BRITTON,
A. B. BROWNE,
W. H. SMITH,
Attys. for Plff. in Error.

122-478

Office Supreme Court U. S.
FILED.
APR 23 1887
JAMES. H. McKENNEY,
CLERK.

In the Supreme Court

of the

United States.

October Term, A. D. 1886.

THE ARGENTINE MINING CO.,
Plaintiff in Error.

vs.

THE TERRIBLE MINING CO.,
Defendant in Error.

Brief and Argument for Defendant in Error.

T. M. PATTERSON,
C. S. THOMAS,
Attorneys for Defendants in Error.

"' lodes and ledges throughout there entire depth, the top
"' or apex of which lies inside of such surface lines extended
"' downward vertically, although such veins, lodes, or
"' ledges, may so far depart from a perpendicular in their
"' course downward, as to extend outside the vertical side
"' lines of said surface location.' The surface side lines ex-
" tended downward vertically determine the extent of the
" claim, except when in its descent the vein passes outside
" of them, and the outside portions are to lie between
" vertical planes drawn downward through the end
" lines. This means the end lines of the surface location,
" for all locations are measured on the surface."

We are unable to understand why it was the court below ruled as it did, and believing, as we do, that it was in error, we ask that its judgment may be reversed.

A. T. BRITTON,
A. B. BROWNE,
W. H. SMITH,
Attys. for Plff. in Error.

122-478

SUPREME COURT U.S.
FILED
APR 29 1887
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term, A. D. 1886.

THE ARGENTINE MINING CO.,
Plaintiff in Error.

vs.

THE TERRIBLE MINING CO.,
Defendant in Error.

Brief and Argument for Defendant in Error.

T. M. PATTERSON,
C. S. THOMAS,
Attorneys for Defendants in Error.

In the Supreme Court

OF THE

United States.

October Term, A. D. 1886.

THE ARGENTINE MINING CO.,
Plaintiff in Error.

vs.

THE TERRIBLE MINING CO.,
Defendant in Error.

Brief and Argument for Defendant in Error.

Section 997 of the Revised Statutes of the United States provides that "there shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned an authenticated transcript of the record *an assignment of errors and a prayer for reversal*, with a citation to the adverse party."

Rule 21, subdivision 4, first promulgated May 1, 1871, amended November 16, 1872, and re-announced January 7, 1884, provides that "When there is no assignment of errors as required by Section 997 of the Revised Statutes, counsel will not be heard except at the request of the court; and errors not specified according to this rule will be disregarded, but the court at its option may notice a plain error not assigned or specified."

The record in this case was filed May 19th, 1884, more than four months subsequent to the last promulgation of the rule just quoted.

By the statuary provision which we have cited, it

would seem that an assignment of errors and a prayer for reversal is as essential a part of the procedure to be followed by the plaintiff in error, as is the suing out of the writ, to which it must be annexed. It is something, the omission of which cannot be remedied, but when error is patent upon the face of the record the court may, by request, hear argument upon it as provided by Rule 21, Section 4.

The record in this case, although it comprises 61 pages, contains no assignment of errors nor prayer for reversal, and up to this date, April 16th, when we received a brief of the counsel for the plaintiff in error, we had no notification of the errors on which they intended to ask for a reversal, unless they were based upon the somewhat general exceptions disclosed by the record.

This defect has been overlooked or ignored by counsel, or else they have sought to cure it by quietly specifying two errors in the argument filed. These were made, and they will be justified under parapraph 2, Section 2, rule 21, of this court. With all deference, however, to the superior knowledge and experience of the distinguished gentleman who made them, we submit that the rule in question was not intended to and does not provide a method for remedying such a deficiency in the transcript of the record, since, if it did, it would be contrary to the terms of Section 997, R. S.

Rule 21 requires that briefs of counsel shall, in all cases, contain a specification of the errors relied on; but that specification must be of errors already assigned, as required by the statute, and not of errors assigned for the first time in the brief; otherwise, Section 2 of rule 21, would not harmonize with Section 4, which expressly declares that when there is no assignment as required by section 997, counsel will not be heard, &c. This *per se* disposes of the the assignment made by counsel. But even if it did not, we think the specification in the brief is not in compliance with the requirement of the rule. We call this condition of things to the attention of the Court at this time and in this way, because it is the first

opportunity which has offered itself to us to do so, and because we think that, under the decisions of the Court upon this subject, a formal motion to dismiss based upon such ground is unnecessary. Where there has been no assignment of errors, as is required by the statute and the rule, this Court has dismissed a cause upon its own motion.

Portland Company vs. United States, 15 Wall. 1. It has also affirmed the judgment of the court below, of its own motion.

Ryan vs. Koch, 17 Wall. 19. It has also opened the record and granted an affirmance on the prayer of the defendant in error, there being no assignment or proper assignment of error.

Maxwell vs. Stewart, 21 Wall. 71.

Treat vs. Jennison, 20 Wall. 652.

The objection which we here urge was presented by us to this Court in the case of the Iron Silver Mining Co., plaintiff in error, vs. Cheeseman et al., defendants in error, at the October term, 1885. The record in that case had been filed anterior to the 7th day of January, 1884, and during the course of the argument an inquiry was made of counsel by the Chief Justice as to the date of such filing. Upon being informed of the date, it was intimated that if the record had been filed subsequent to January 7th, 1884, it would be considered. The rule as hereinabove appears was adopted first in 1871, and when readopted in January, 1884, it was not changed in any of its requirements nor in its phraseology. Following the decision, quoted above we ask that the judgment of the court below be affirmed by reason of the non-compliance by the plaintiff in error with the requirements of Section 997. Even if the specification of errors in the appellant's brief could cure the defect of the absence of the assignment of errors, it cannot affect that other provision of the statute, equally imperative in our judgmet, which requires that the writ of error shall be accompanied by a prayer for reversal. So much for the objection which we offer to the consideration to the case.

The statement made by counsel for plaintiffs in error

is hardly full enough, in our judgment, to give the court a clear understanding of the controversy. We shall be as brief as possible in stating our view of it, and of the questions which were proper subjects of consideration at the trial in the court below. The defendants in error were the owners of the Adalaide Mining claim, situate in California mining district, Lake County, Colorado. The plaintiff in error was the owner of two certain other claims, called the Pine and Camp Bird, which conflicted in their exterior boundaries with the Adalaide location, which latter claim was the senior, both in discovery and location, the date of the certificate being August 2, 1876. The plaintiff in error was the owner, by purchase, of the Pine, Camp Bird and Charlestown lode claims, all of which were located during the year 1877. The relative positions of these claims to each other can be seen by consulting the first map which is attached to the transcript of the record. They show the Pine, Camp Bird and Charlestown claims to occupy a position practically north and south, with their end lines practically east and west; while the Adalaide claim occupies longitudinally a northeast and southwest direction, in consequence of which the Pine, Camp Bird and Charlestown cross it diagonally. The plaintiff in error, by its workmen, sometime during the summer of 1880 carried its workings through the Pine claim, over into the ground occupied respectively by the Pine and Adalaide locations, and continued in a southeasterly course into the Adalaide ground. In 1878 the plaintiff in error applied for a patent to each of its said claims, and to certain other claims owned by it, lying to the north of and adjoining the Pine, Camp Bird and Charlestown, known as the Keystone and Young America lodes, and was adversed by the Adalaide as to the ground in conflict between it and the Pine, Charlestown and Camp Bird. In consequence, that part of the ground in conflict was relinquished by the plaintiff in error, and it accepted patents from the Government, excepting such conflict from the terms of its grant. At folio 75 of the transcript the following exception appears in Camp Bird patent: "Excepting and excluding, however, all that por-

tion of such surface ground embraced by mineral survey No. 254 of the Adalaide mining claim, and also excepting and excluding all veins, lodes, ledges or deposits, the tops or apexes of which lie inside of the exterior lines of said Adalaide survey at the surface, extended downward vertically, or which have been therein discovered or developed." The same exception was inserted in the patent to the Pine lode, although in different terms, as appears at folio 86 of the transcript, and the same also appears in the patent to the Charlestown lode as set forth at folio 111 of the transcript. Each of these patents is accompanied by a diagram showing the ground conveyed by the patent and the exception of that part of the claim covered by the Adalaide. On the 11th day of October, 1880, the grantor of the defendant in error, Frederick S Van Zandt, filed his complaint in ejectment in this cause in the Circuit Court of the United States. Issue was joined upon it, and a trial was had at the May term, 1881, which resulted in a verdict for the plaintiff. Afterwards, and on the 5th day of November, 1883, the Adalaide claim having been conveyed to the defendant in error an amended complaint was filed, setting up that fact and also attempting to deraign title by virtue of a receivers receipt for the premises. The second amended answer was filed on the eve of trial and was considered as having been replied to, especially as the defense therein set forth was virtually the defense already made in the action. By that defense the plaintiff in error alleged its ownership of the Pine and Camp Bird claims and of the apex of a lode within their exterior lines which, in its course downward, departed from the lines of said claims and into the Adalaide ground. The testimony introduced by the defendant in error established the discovery of a vein in the discovery shaft of the Adalaide claim and of its proper staking and recording. The location certificates of the Adalaide, both of which were filed before the location of the other claims, were introduced together, the court holding that all defects of the original were cured by the subsequent location. It then introduced evidence showing that the location of the Adalaide

claim was made upon the top or apex of a vein or lode of rock in place bearing silver (fol. 68.) It also introduced evidence tending to prove that the vein discovered, if any was there found and upon which the location was made, is the identical vein disclosed in all of the workings made either by plaintiff or defendant within the limits of the Adalaide claim, and also that the course of the top or apex of the lode discovered in the Adalaide claim is almost at right angles across said claim crossing the side lines thereof near its northeast end, and also that the Adalaide was discovered and located before the Pine, Camp Bird, or any other claims of the defendant were in existence. The defendant introduced the patents before referred to together with conveyances made to it by the locators of said claim after which it introduced the witness William B. Page to identify the correctness of the map marked Exhibit A, which accompanies the transcript of the record, showing among other things, that the apex or top of the vein claimed to be in the said Pine, Camp Bird and Charlestown lodes crosses the side lines thereof almost at right angles, and also showing that the northerly end line of the Pine claim, as patented, north of the Camp Bird; that part of the Pine lying to the north thereof, however, being excluded from the patent. At folio 129 he says that the line of the apex is indicated on the map as nearly at right angles to the side lines of the Pine and Camp Bird lodes, and that the strike of a vein is always at right angles with its dip. The same testimony was given in effect by other witnesses. The plaintiff in error then asked a number of instructions, the second one of which is made its first specification of error. It seems to have abandoned all objection to the integrity of the Adalaide location and to the exceptions saved in the record to the introduction of testimony, and confines the assignment of errors in addition to the one already mentioned to the third instruction given by the court.

Argument.

We shall assume that it is unnecessary for us to discuss any exception which the record contains, and which

is not included in the assignment of errors contained in the plaintiff's brief. As to the first of said assignments we have to say that the instruction as prayed for contains an abstract proposition of mining law of unquestioned soundness, but the difficulty consists in the fact that it is not applicable to the case at bar. In the first place the defendant in error has established to the satisfaction of the jury that it was the owner of a senior location made upon the same lode or vein upon which was subsequently located the claim of the plaintiff in error. It showed that the strike of the apex of its vein crossed its side lines near its northeasterly end, and in such a direction as that the apex of the plaintiff's vein, if continued in its own direction, would occupy the same space. It also showed that all developments made by it, as well as by the plaintiff in error, on Adalaide ground was upon this identical vein. The plaintiff in error, by the introduction of its patents, as well as by the acceptance of them from the Government, established the fact that the Adalaide claim was senior by discovery and by location to any claims of the plaintiff in error, else no exception of the premises in conflict between these several locations would ever have been made in favor of the Adalaide claim and its owners.

By its own testimony, as well as by the maps which were introduced, and which form a part of the transcript of the record in this case, it showed that the vein, the apex of which it claimed to own by reason of its ownership of the Pine, Camp Bird and Charlestown, was the same vein upon which the defendants in error had made their location, and which, by virtue of seniority of location, became theirs at least to the extent of the ground comprised within the Adalaide boundaries. It also established, by its testimony, what had already been established by the evidence of the defendant in error, that the apex of its so-called vein crossed the side lines of the Pine and Camp Bird lodes at right angles to the side lines of their claim, thereby limiting their right to follow their vein even if such right existed independent of other circumstances, to that part of the territory in dispute, comprised within the side line of

their claim extended, because it has been decided by this Court that wherever a mining claim is located across instead of along the course or strike of a vein, its side lines become its end lines for the purpose of determining the extent to which it may follow such vein into adjoining premises.

Mining Co. vs. Tarbet, 92 U. S. 470.

Mining Co. vs. Elgin Co., 118 U. S. 196.

The plaintiff in error not only assumed to cross its own lines and enter upon that part of the Adalaide which was within the Pine and Camp Bird locations, but it also assumed the right to proceed eastward and across its side lines, which, as we have seen, must be considered its end lines, and deliberately entered upon and beneath that part of the Adalaide claim which was outside of and beyond the point of conflict. This act is either a deliberate trespass or it must be justified by the proposition that the plaintiff in error has the right to go beyond the side lines of its claims, even though the top or apex of its vein crosses such lines instead of the end lines of the claim, which is at variance both with reason and authority. When a claim is laid cross-wise of the vein instead of along it, the vein does not depart from the side lines in its course *downward*, but in its course or trend *laterally*.

A glance at Exhibit "A" shows the extent of the trespass of which we complain. The plaintiff in error carefully confined itself to its own territory, and respected the boundaries of the Terrible claim in its course southward. When, however, it reached the boundaries of the Adalaide, it deliberately abandoned this course, and, proceeding in an almost easterly direction, it ravaged and spoiliated the property of its neighbor until the enormity of its trespass made longer concealment impossible. When discovered in its career of robbery, it for the first time asserted its pretended right to our ore, because it had, or claimed to have, an apex crossing its claims at right angles, and running *nearly parallel with the course of its workings.*

But the testimony which it presented to the jury in support of its so-called right, even had it tended to establish the claim of the plaintiff in error, was false upon its

face, and shown to be so by the admissions of its witnesses. Exhibit "A" was drawn for the purpose of deceiving, and but for the necessity of introducing the patent for the Pine claim, it might have succeeded. The court will bear in mind that in both the answers which it filed the plaintiff in error defended its action because it was the owner of two claims called the Pine and Camp Bird, which contained within their exterior boundaries the apex of a vein, etc. Exhibit "A," which was verified by the testimony of its witnesses, was cunningly devised so as to show the north end line of the Pine claim extended nearly 300 feet beyond the north end line of the camp Bird, and within 25 feet of the north side line of the Keystone claim, thereby obliterating nearly the whole of the easterly end of the latter claim.

The fact, however, is, that the north end line of the Pine claim is about 20 feet south of the north end line of the Camp Bird. The alleged apex of the vein therefore crosses the end line of the Pine, about sixty feet from its westerly side, so that the greater part of it is on the Keystone and not upon the Pine location. Even, therefore, if this defense as interposed were tenable, the plaintiff in error could only follow to the extent of the apex covered by its location, and its right to enter our territory disappears.

Duggan vs. Davey, 26 N. W. Reporter, 887.
Stevens vs. Williams, 1 Mining Reports, 557.
Mining Co. vs. Murphy, 2 McCrary, 121.
Iron Silver Co. vs. Elgin Co., *supra.*

That there may be no mistake about the fact here asserted, we call attention to the testimony, as contained in the transcript of the record. On the map marked Exhibit "A" the court will notice a blue line drawn across the Pine claim, passing through the center of the northerly stope on that claim and marked "B. A. D." Mr. Page, who made the map, admits this and says that the ground to the north of it is included in the Keystone claim.

If, now, we turn to the description contained in the patent of the Pine claim, we find that it corresponds ex-

actly to the line indicated, while the plat of the ground contained within such description, and which accompanies and is a part of the patent itself, places the northerly end line of the claim to the south of the north end line of the Camp Bird, leaving the remainder of the Pine survey to the north and within the boundaries of survey No. 238, being designated by dotted lines. We presume that the surveyor extended the line upon "Exhibit A" because the original location of the Pine extended in that direction, but since the defendant alleged title by patent, it was a manifest attempt to deceive by seeking to extend the line so far north as to include the alleged apex.

Not content with the introduction of his Pine patent, the plaintiff in error also introduced its patent to the Keystone, being survey No. 292. By that patent it would seem that the ground included between the north end line of the Pine, as patented, and its north end line, as located, was abandoned by the plaintiff in error, although it manifestly intended to secure it by its survey of the Keystone. As it is, it belongs practically to the Government, and, conceding, for the sake of the argument, that the plaintiff in error has an apex at this point in its original location of the Pine claim, its property to the same has long since terminated by its acceptance of patents which do not include it.

We can therefore assume as a fact that plaintiff's own case estops it from entering upon the Adalaide claim, and its act in crossing the lines of its patented territory, and taking hundreds of tons of ore from the premises of the defendant in error is unjustifiable, either in law or in morals. Upon the assumption that it has the right to follow its vein in its course downward, confining itself to those boundaries which the law makes its end lines, and conceding, for the sake of the argument, that so far as it has the apex crosswise of its claim it has this correspent right, yet that right must of necessity be subject to and limited by the existence of a similar senior right belonging to the defendant in error, for the claim of the defendant in error fully one year older than any of the

claims of the plaintiff in error, is similarly located; that is to say that, near the northern end of the Adalaide is the strike or apex of the same vein which crosses the Adalaide practically at right angles to its side lines as it curves a little to the south in its course eastward, where it approaches Stray Horse Gulch. The owners of the Adalaide therefore, are in the same position as are the owners of the Pine and Camp Bird, with the additional advantage which seniority gives them. By the rule established in the Flagstaff case the side lines of its claim become its end lines, and they have the right to follow the vein discovered to any depth in its course downward, although it may depart from the legal side line of the claim. This right they have not attempted to exercise, their operations having been confined entirely to the limits of their claim. By asserting a similar right the plaintiffs in error have trespassed upon that part of the vein belonging to the defendant in error by virtue of its senior location, and since there cannot be two adverse owners of the same part of the same vein, and since our rights are recognized in the patents of the plaintiff in error, and since we are in possession of that segment of the vein originally located, the jury could not have done otherwise than to give us a verdict. We say, therefore, that the court did right in rejecting that part of the instruction asked by the defendant and excepted to here because it is wholly foreign to any question presented by the record in the case.

But even if this exception were well taken it cannot be urged in this Court at this time, since it formed no part of the grounds upon which the motion for a new trial was based. That motion is set out in full at folio 141, and no complaint is made therein that the Court erred for refusing to give any instruction asked by the defendant. It is a general principle of practice, which needs the citation of no authority for its support, that error complained of as having been committed during a trial must be brought to the attention of the trial court by motion to set aside the verdict and for a new trial, in order that such court may have opportunity to consider and rectify such error, if

any exists. Not having done so, the plaintiff in error has waived any and all exception by it taken, to the failure of the court to give the charge under discussion.

The same consideration applies to the second specification of error in the argument. In the motion for a new trial it is not complained that the court erred in the instructions given by it to the jury, but that the verdict of the jury was contrary to such instructions. Can the plaintiff in error acquiesce in the integrity of the instruction as given and complain to the trial court that its instructions were disregarded, and then appeal to this Court and seek to reverse the judgment upon the ground that the instructions themselves were erroneous? We think not.

That part of the instruction given by the court and excepted to contains, in our judgment, the gist of the entire controversy. It reads as follows: "The question turns upon the validity of this Adalaide location. As I have explained to you, if you believe it to be a valid location, well made according to the law as given in the statute, you will find for the plaintiff."

This instruction after all is not excepted to, but complaint is made that it should have been accompanied by an additional instruction that if the jury believed from the evidence that the location of the Adalaide claim was made upon the dip of a vein or lode whose top or apex was then in and extended through the patented territory of the defendant such location to the extent of its being on such dip would be invalid. It would have been an absurdity to have given any such instruction; first, because the testimony introduced did not furnish the basis of any such instruction; second, because the plaintiff in error was outside of an beyond the end lines of his claim; third, because the Adalaide had as much of the alleged apex as did the Camp Bird and Pine; and fourth, because the evidence showed to the satisfaction of the jury that all the workings in the Adalaide territory whether made by plaintiff or defendant were upon the same deposit of mineral. To judge of the validity of the charge excepted to it is necessary to read it in connection with the remainder of the charge.

given. It covers the entire ground which we have contended for and every fact seriously controverted in the case.

We deem it necessary at this juncture to call the attention of the court to the fact that the top or apex of the vein testified to in this case is not that of a fissure or other vein coming to the surface, but of a mineral deposit lying between two different formations of rock having a gentle inclination downward into the earth and not coming to the surface at all. This is shown by the sections which constitute Exhibit B of the transcript. Such a mineral deposit can only be discovered by sinking a shaft through the upper stratum to it. A miner is therefore as likely to make a discovery of it at one place as another. The accident of location may or may not give him the highest point. If he should make a senior discovery upon what would subsequently prove to be the dip rather than the top of a lode, it would be a manifest injustice to deprive him of the benefit of the discovery because some junior locator had made a location on the same vein at a higher point. This question was directly presented on the first trial of the case and it was held that a senior locator was entitled to the mineral within the limits of his claim as against a junior locator above him, which in our judgment is justice and equity as well as good law. The question is not in the present record of the case, but if it were, we believe the decision of this court would be the same. Inasmuch as it was not presented it would have been idle for the trial court to have said anything about it. We ask, therefore, that the judgment of the court below be in all things affirmed.

T. M. PATTERSON,
C. S. THOMAS,
Attorneys for Defendants in Error.